DEC 27 1954
HAROLD B. WILLEY, CL

Supreme Court of the United States

No. 496

MINNIE M. GUYER,
Petitioner

v.

CAROL E. ELGER, Administratrix of the Estate of GEORGE ELGER, Deceased; and CAROL E. ELGER, Administratrix of the Estate of SYLVIA E. ELGER, Deceased.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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THE TORCH PRESS, CEDAR RAPIDS, IOWA

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Minnie M. Guyer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered November 9, 1954.

OPINIONS BELOW

The memorandum opinion of the District Court, which was attached to its Order overruling Petitioner's Motion for Judgment Non Obstante Veredicto, appears at pages 80 to 83 of the record and is appended to this petition at Appendix pages 10-14 and is not officially reported. The opinion of

the Court of Appeals appears following page 91 of the record, is appended to this petition at Appendix pages 1 to 9 and is officially reported in 216 F. 2d 537.

JURISDICTION

Judgment of the Court of Appeals was entered on November 9, 1954 (Certified copy of Judgment follows page 91 of the record). On application of the Petitioner, the Court of Appeals ordered a stay of its mandate for a period of thirty days from and after November 29, 1954, within which the Petitioner could petition for certiorari (Certified copy of Order follows page 91 of the record). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. May the Court of Appeals under the *Rules of Decision Act*, 28 U. S. C. 1652, and under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, refuse to follow controlling decisions of the Supreme Court of Iowa, on the forecast that the trend of recent decisions by that court on different facts indicate that the Supreme Court of Iowa will overrule the controlling decisions in the future?

2. May the Court of Appeals for the Eighth Circuit, contrary to law and to the accepted and usual course of judicial proceedings and contrary to the practice followed in all other circuits, decline to perform its duty to determine independently the governing rules of law applicable to the case before it by accepting a "permissible conclusion" of the District Court on a question of state law and thus in effect deny to the litigant his statutory right of appeal?

3. Is the decision of the Court of Appeals for the Eighth Circuit in the case at bar in conflict with the decisions of other Courts of Appeal in *Mangol v. Metropolitan Life Ins. Co.*, 7 Cir., 103 F. 2d 14; *Grand Trunk Western Co. v. H. W. Nelson Co.*, 6 Cir., 118 F. 2d 252; *Fakori v. Cadais*, 5 Cir., 149 F. 2d 321?

STATUTES INVOLVED

1. 28 U. S. C. 1652, p. 4211 (1952 ed.) which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2. 28 U. S. C. 1291, p. 4183 (1952 ed.) which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court of the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Respondent, a citizen of Illinois, as Administratrix of the Estates of George Elger and Sylvia E. Elger, brought this action for damages for their deaths growing out of an automobile collision between their car and the car operated by Petitioner, a citizen of Iowa. Federal jurisdiction in this case is based upon diversity of citizenship and amount in

controversy (R. 1-4). At the close of the Respondent's case and again at the close of all the evidence the Petitioner moved for a directed verdict on the ground that the evidence was speculative and conjectural and failed to present a jury question on the issue of Petitioner's alleged negligence (R. 30; 51-52). The motions of Petitioner were overruled (R. 30; 54-57). Following the verdict of the jury judgment was entered in favor of Respondent (R. 76-77). Petitioner then moved for judgment non obstante veredicto and this motion was overruled (R. 77-83). Petitioner perfected a timely appeal to the United States Court of Appeals for the Eighth Circuit and that court entered its judgment affirming the judgment of the District Court (Certified copy of judgment follows page 91 of record).

The accident occurred on U. S. Highway 64 approximately four miles west of Maquoketa, Iowa (R. 50, 21, 23). The Petitioner, driving a 1949 Cadillac sedan, was proceeding in an easterly direction (R. 34-35). The decedents were proceeding westerly in a Ford Sedan (R. 21, 35).

The Petitioner was the only survivor and the only eye witness. She testified that as the cars approached each other both were on their own side of the center line and that when the cars were quite close together the decedents' car suddenly swerved over into petitioner's lane of travel (R. 35).

The evidence offered by Respondent was wholly circumstantial. It was a rainy morning and was misting or drizziling at the time of the accident (R. 31, 35, 49). The witnesses who came on the scene shortly after the accident referred to mist or rain (R. 27, 28, 31, 32, 49). Those who came a half hour to an hour later testified that a hard heavy rain was falling by that time (R. 23-24, 26).

The Ford came to rest east of the Cadillac and off the north edge of the travelled portion of the highway, facing in a northeasterly direction. The Cadillac was facing west of north with all but the rear bumper and part of the trunk on the north side of the center line (R. 24; Pl. Ex. A; R. 9, 8; Pl. Ex. B; R. 11, 8; Pl. Ex. C; R. 13, 8). The left rear of the Ford was approximately twelve feet from the right side of the Cadillac (R. 21, 24).

Several witnesses for Respondent testified that water extended across the pavement from twenty-five to thirty feet in an easterly and westerly direction approximately twenty-five feet from where petitioner's car came to rest (R. 22, 24, 26). One witness saw cars splash water at this point earlier in the morning (R. 50). The other witnesses who observed the water did so sometime after the accident in the midst of the rain, estimating its depth at two to two and one-half inches (R. 22, 24, 25, 26, 28).

Dirt and debris were scattered on both sides of the center line of the highway (R. 22, 49). None of the witnesses observed any marks or tracks on the highway (R. 22, 24, 26, 28).

The sole question for determination by the District Court and the Court of Appeals was whether the Repondent's evidence was sufficient to submit the question of Petitioner's liability to the jury under the laws of Iowa.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Failed to Follow the *Rules of Decision Act*, 28 U. S. C. 1652, and Has Departed from the Doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, by Refusing to Follow Controlling Decisions of the Supreme Court of Iowa on the

Forecast that the Trend of Recent Decisions by that Court on Different Facts Indicate that the Supreme Court of Iowa will Overrule the Controlling Decisions in the Future.

This accident arose out of an automobile collision in Iowa. The laws of Iowa must be regarded as the "rules of decision" in the instant case. 28 U. S. C. 1652; *Erie R. Co. v. Tompkins*, 304 U. S. 64. Petitioner respectfully submits that the Courts below in reaching their decisions failed to follow the controlling decisions of the Supreme Court of Iowa. The Courts below in effect predicted that the Supreme Court of Iowa would overrule these controlling decisions. These predictions were based upon an alleged trend and an alleged change in attitude supposedly demonstrated by the Supreme Court of Iowa in recent decisions. The decisions referred to were in fact completely in harmony and accord with the controlling decisions or were decisions with no analogy either to the instant case or to the controlling decisions.

It is respectfully submitted that in so doing the Courts below departed from the rule frequently pronounced by this Court that the Rules of Decision Act places a duty upon the federal courts to apply state law in accordance with the then controlling decision of the highest state court. *Vandenbork v. Owens-Illinois Glass Co.*, 311 U. S. 538; *West v. American Teleph. & Teleg. Co.*, 311 U. S. 223. A determination of the question presented is of substantial importance to the rights of litigants in federal courts.

The sole question for determination by the Courts below was whether the respondent, as a matter of law, intro-

duced sufficient evidence to make a jury question on petitioner's liability.

The Supreme Court of Iowa has spoken in six decisions, none of which has been overruled, and has unequivocally held that before a collision involving two motor driven vehicles proceeding in opposite directions upon the highway is submissible to a jury, based only on circumstantial evidence, there must be *substantial evidence* of the invasion of the defendant's vehicle onto the plaintiff's lane of travel *prior* to collision. *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863; *Vandell v. Roewe*, 232 Iowa 896, 6 N. W. 2d 295; *Potter v. Robinson*, 233 Iowa 479, 9 N. W. 2d 457; *In Re Goretska's Estate*, 234 Iowa 1080, 13 N. W. 2d 432; *Smith v. Darling & Co.*, 244 Iowa 133, 56 N. W. 2d 47; *Hackman v. Beckwith*, (Iowa) 64 N. W. 2d 275.

In three of these cases there was evidence of tire marks or other physical facts which definitely located the point of impact and which would have the tendency to prove that the defendant's vehicle invaded the plaintiff's lane of traffic prior to the point of impact and prior to the time of the collision. In these three cases the Supreme Court of Iowa held that the plaintiff had made a case which was submissible to the jury. *In Re Goretska's Estate*, 234 Iowa 1080, 13 N. W. 2d 432; *Smith v. Darling & Co.*, 244 Iowa 133, 56 N. W. 2d 47; *Hackman v. Beckwith*, (Iowa) 64 N. W. 2d 275. In the other three cases the plaintiff's evidence consisted primarily of the position of the vehicles where they came to rest after the collision. In each case the Supreme Court of Iowa held that this evidence alone was not sufficient to present a jury question as to defendant's alleged liability. *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863; *Vandell v. Roewe*, 232 Iowa 896, 6 N. W. 2d 295; *Potter v. Robinson*,

233 Iowa 479, 9 N. W. 2d 457. In holding that evidence of the position of the cars when they came to rest after the collision was insufficient, the Supreme Court of Iowa stated in *Reimer v. Musel*, 217 Iowa 377, 381, 251 N. W. 863, 865:

> "And no negligence on the part of the appellant is shown by the location of the cars. Where they were when they came to rest proves nothing whatever with reference to their location at the time of the collision."

The six Iowa cases above cited are not in conflict in any way, but are harmonious and can be completely reconciled one with another.

In the instant case the evidence offered by respondent was wholly circumstantial. Respondent relied primarily on evidence of the location of the vehicles after they came to rest following the collision (R. 24, Pl. Ex. A; R. 9, 8, Pl. Ex. B; R. 11, 8, Pl. Ex. C; R. 13, 8). Dirt and debris were scattered on both sides of the center line of the highway (R. 22, 49). None of the witnesses observed any marks or tracks on the highway (R. 22, 24, 26, 28). The actual point of impact was not determinable from the evidence.

The only other factual element in this case is the pool of water through which the petitioner's car may have traveled prior to the collision. The record does not show that any substantial amount of water was present on the highway at the time of the collision. All estimates as to the depth of the water were made as of a time considerably after the accident and after the rain had changed from a mist or light rain to a heavy rain (R. 22, 23, 24, 25, 26, 28, 31, 35, 49, 50). There was no evidence that the petitioner's heavy Cadillac was in any way deflected from its proper

lane of traffic by the water or that the petitioner's vehicle invaded decedent's lane of traffic prior to the collision.

The respondents evidence therefore was clearly insufficient under the six decisions of the Supreme Court of Iowa to make a submissible question to the jury on the question of petitioner's liability. *In Re Goretska's Estate*, 234 Iowa 1080, 13 N. W. 2d 432; *Smith v. Darling & Co.*, 244 Iowa 133, 56 N. W. 2d 47; *Hackman v. Beckwith*, (Iowa) 64 N. W. 2d 275; *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863; *Vandell v. Roewe*, 232 Iowa 896, 6 N. W. 2d 295; *Potter v. Robinson*, 233 Iowa 479, 9 N. W. 2d 457. Under these decisions the respondent's evidence as to the position of the cars and debris after the accident would not in itself be sufficient and respondent offered no evidence of the location of the point of impact and no evidence which tended to show that the petitioner's vehicle invaded the decendent's side of the highway prior to the collision.

The Courts below held that if the facts of the present case were before the Supreme Court of Iowa, it would hold that the evidence was sufficient to make a jury question on the petitioner's liability. In doing so the Courts below of necessity held that the Supreme Court of Iowa would now take the view that the position of the vehicles where they came to rest after the collision was sufficient to make a jury question. This is a prediction that the Supreme Court of Iowa would overrule its present decisions of *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863; *Vandell v. Roewe*, 232 Iowa 896, 6 N. W. 2d 295; and *Potter v. Robinson*, 233 Iowa 479, 9 N. W. 2d 457.

The Court of Appeals did not attempt any analysis or reconciliation of the controlling Iowa decisions (Opinion p. 8, 9, following R. 91). The Court of Appeals accepted the

conclusion of the trial court as to the applicable Iowa law on the basis that the District Court reached a "permissible conclusion" (Opinion, p. 7, 8, 9, following R. 91). In its Opinion the Court of Appeals adopted much of the language and reasoning of the District Court and quoted extensively from the District Court's Memorandum Opinion (Opinion, p. 6, 7, following R. 91).

The District Court in reaching its conclusion that the Supreme Court of Iowa would now hold that evidence of the position of the automobiles and the debris following a collision would be sufficient to make a submissible jury question without evidence relative to the course of the vehicles before collision also failed to attempt to analyze or reconcile the Iowa decisions (R. 80-83).

The District Court forecast that the Iowa Supreme Court would no longer follow *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863; *Vandell v. Roewe*, 232 Iowa 896, 6 N. W. 2d 295; and *Potter v. Robinson*, 233 Iowa 479, 9 N. W. 2d 457, and would now consider circumstantial evidence of the position of the vehicles and of the debris after the accident, standing alone, sufficient to make a jury question. The Court quoted from the recent case of *Slabaugh v. Eldon Miller, Inc.*, 244 Iowa 29, 33, 55 N. W. 2d 528, 530:

> "* * * How motor vehicles will rebound after a collision is something no one can definitely say. A car, or truck, which is clearly upon the lefthand side may be driven back upon its own proper part of the highway by the force of the collision, and conversely the one which is struck while lawfully in its own lane may rebound across the pavement to the left side. Granted that there is room for argument that this is unlikely, and that some weight may be attached to the positions of the vehicles as they come to stop after colliding, we

think whatever that weight may be is ordinarily a question for the jury." (R. 82)

The only conceivable purpose the District Court could have had in using this quotation was to attempt to show that it is now the position of the Supreme Court of Iowa that evidence as to the positions of vehicles as they come to stop after colliding alone raises a question for the jury. An examination of the *Slabaugh* case, however, shows that the case is not in point as the question in that case was the weight to be given the position of the vehicles in face of adverse *eye witness* testimony. The Supreme Court of Iowa held that whatever weight might be attached to such evidence under the circumstances was a question for the jury and *did not hold nor can it fairly be implied* from the case that the Supreme Court of Iowa is now of the opinion that evidence of the position of the vehicles after an accident, standing alone, always made a jury question on liability for the accident. It merely held that in the ordinary case the jury may consider it to support or impeach eye witness testimony. In fact, the greatest portion of the quotation from that case by the District Court indicates what little value the Supreme Court of Iowa places on such evidence (R. 82).

The District Court in its Memorandum Decision indirectly attempted to show that the case of *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863, was perhaps no longer the law of Iowa by a discussion of the change in rule followed by the Supreme Court of Iowa in connection with circumstantial evidence in civil cases from the so-called "exclusion of every other hypothesis rule" to the "more reasonably probable rule" (R. 80, 81). This discussion was quoted by the

Court of Appeals (Opinion, p. 6, following R. 91). That the change of rule had no effect on the force of the *Reimer* case as a precedent is clearly demonstrated by the fact that it was cited with approval in *Vandell v. Roewe*, 232 Iowa 896, 6 N. W. 2d 295, after the "more reasonably probable rule" was clearly established. *Boles v. Hotel Maytag*, 218 Iowa 306, 253 N. W. 515; *Latham v. Des Moines Electric Co.*, 229 Iowa 1199, 296 N. W. 372; *Rodefer v. Turner*, 232 Iowa 691, 6 N. W. 2d 17. If the Supreme Court of Iowa has refused to distinguish the *Reimer* case on the basis of a change in the rule on circumstantial evidence it is not the duty of a federal district court to do so and the District Court in this case made no serious attempt to do so.

The District Court fully realized that it was departing from the rule announced by the Supreme Court of Iowa in the case of *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863, when it stated in its Memorandum Decision:

> "It is the view of this Court that if the present views and attitude of the Iowa Supreme Court as to submissibility in civil cases involving circumstantial evidence were the same as the views expressed and attitudes shown in the earlier cases, such as the case of *Reimer v. Musel* (1933), 217 Iowa 377, 251 N. W. 863, that that Court would hold that the evidence in the present case did not warrant the submission to the jury of the question here involved."

By this quotation the District Court admits that it would not follow the *Reimer* case; yet this case has never been overruled by the Supreme Court of Iowa and petitioner respectfully submits that it represents one of the "rules of decision" applicable in this case.

In its final attempt to justify its conclusion that re-

spondent's evidence in the instant case was sufficient to make a jury question the District Court looked to three recent Iowa cases where the Supreme Court of Iowa had reversed the trial judge on questions of submissibility (R. 82, 83). Two of these cases did not involve automobile collisions and were therefore completely dissimilar on their facts. *Roller v. Independent Silo Co.*, 242 Iowa 1277, 49 N. W. 2d 838. *Nicholson v. City of Des Moines*, (Iowa) 60 N. W. 2d 240. In the other case the plaintiff had presented physical facts showing the defendant's vehicle had invaded the plaintiff's lane of traffic prior to the collision and the point of impact was definitely fixed. *Smith v. Darling and Co.*, 244 Iowa 133, 56 N. W. 2d 47. The District Court then went on to state:

> "This Court is of the view that the trend of the decisions of the Iowa Supreme Court in civil cases in which circumstantial evidence is involved has been in favor of submissibility and away from the somewhat more strict views expressed and somewhat more strict attitude indicated in the earlier cases." (R. 83)

The Court of Appeals quoted this portion of the District Court's Memorandum in its Opinion (Opinion, p. 7, following R. 91). The Courts below had no cogent reason to look for a trend in the Iowa cases. The latest decisions of the Supreme Court of Iowa on analogous facts, *Smith v. Darling & Co.*, 244 Iowa 133, 56 N. W. 2d 47, and *Hackman v. Beckwith*, (Iowa) 64 N. W. 2d 275, were completely in harmony and accord with the four previous Iowa decisions in which the Supreme Court of Iowa had faced this question. *In Re Goretska's Estate*, 234 Iowa 1080, 13 N. W. 2d 432; *Reimer v. Musel*, 217 Iowa 377, 251 N. W. 863; *Vandell v.*

Roewe, 232 Iowa 896, 6 N. W. 2d 295; *Potter v. Robinson*, 233 Iowa 479, 9 N. W. 2d 457. The fortuitous circumstance that in these last two cases the plaintiff was able to present evidence of physical facts establishing the point of impact and showing an invasion of the plaintiff's lane of traffic prior to the collision and on that basis was able to make a submissible question does not indicate a "trend" in favor of submissibility or a change of attitude by the Supreme Court of Iowa.

The District Court and the Court of Appeals, by adopting the District Court's conclusion, both erred in failing to follow the *Rules of Decision Act*, 28 U. S. C. 1652. Both courts departed from the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64 by basing their conclusion as to the applicable state law on an alleged "trend" in recent Iowa decisions which supposedly indicated that the Supreme Court of Iowa would no longer follow the controlling decisions and that such controlling decisions had been overruled by implication. In so doing the Courts below failed to follow the duty imposed upon them by this Court to apply state law in accordance with the controlling decision of the highest state court. *Vandenbork v. Owens-Illinois Glass Co.*, 311 U. S. 538. When the state law applicable to a particular factual situation has been authoritatively declared by the highest state court the federal courts must follow such declarations. This Court stated in *West v. American Teleph. & Teleg. Co.*, 311 U. S. 223, 236:

> "* * * the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and per-

suasive indication that its pronouncement will be modified, limited or restricted."

The Courts below by failing to follow the controlling decisions changed the law of Iowa applicable to these litigants by implication and prophecy. In so doing the Courts below exercised a function which should be reserved for the Supreme Court of Iowa. It is respectfully submitted that the Courts below in this case did not follow the mandate of the *Rules of Decision Act*, 28 U. S. C. 1652 and departed from the doctrine established by this court in *Erie R. Co. v. Tompkins*, 304 U. S. 64.

II

The Court of Appeals, Contrary to Law and to the Accepted and Usual Course of Judicial Proceedings, and Contrary to the Practice Followed in all other Circuits, Declined to Perform its Duty to Determine Independently the Governing Rules of Law Applicable to the Case Before it by Accepting a "Permissible Conclusion" of the District Court on a Question of State Law, thus in Effect Denying to Petitioner Her Statutory Right of Appeal.

After the District Court entered judgment, petitioner was entitled to an appeal under 28 U. S. C. 1291, which provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United State * * * except where direct review may be had in the Supreme Court."

Petitioner respectfully submits that it is the function and duty of the appellate court on an appeal to re-examine

and determine anew and independently all questions of law properly brought to its attention. Petitioner further submits that the Court of Appeals for the Eighth Circuit has departed from the accepted and usual course of judicial proceedings by applying a rule of its own creation by which it accepts, without independent inquiry, a "permissible conclusion" of a District Judge on a "doubtful" question of local law. This rule, as applied by the Court of Appeals for the Eighth Circuit, effectively deprives a litigant of his traditional and statutory right of a full review of the questions of law arising from his case and in all but rare instances makes the District Court the final arbiter on questions of both law and fact. Petitioner also protests that in the instant case, the questions of law were reviewed on appeal as if they were questions of fact, and that the Court of Appeals therefore obliterated the distinction between a review of the law and a review of the fact findings under rule 52(a), where admittedly the findings shall not be set aside unless "clearly erroneous." Fed. Rules of Civ. Pro., Rule 52(a), 28 U. S. C.

One of the most fundamental and important elements of the judicial system in the United States since its establishment has been the right of appellate review. This has been universally true in both the federal and state court systems. Under this system the rights of litigants have been safeguarded in that no litigant need accept the judgment of one man, the trial judge, as to the rules of law applicable to his case, but may appeal to a higher tribunal for correction of the alleged errors of the trial court. Under the judicial system in this country it is presumed that an appellate court's conclusions of law are superior to those of the trial court because of the additional judges, the greater oppor-

tunity and better facilities for study of the questions involved, the opportunity for exchange of ideas among the several judges and because appellate judges are specialists who may make their determinations free from the distractions caused by the many other duties of a trial judge.

This Court, with respect to questions of law, has always defined an "appeal" as a full review, examination and determination anew of the controlling legal principles with the purpose of protecting the litigants against error made by an inferior court. *Marbury v. Madison*, 5 U. S. 137, 175; *Wiscart v. D'Auchy*, 3 U. S. (3 Dallas) 320, 326; *In Re Neagle*, 135 U. S. 1, 42; *McLish v. Roff*, 141 U. S. 661, 665. The same definition applies, and the same duty to make an independent determination applies when the court of appeals is confronted with a question of local law. *Huddleston v. Dwyer*, 322 U. S. 232.

In its opinion in the instant case the Court of Appeals quoted extensively from its prior decision in *National Bellas Hess, Inc. v. Kalis*, 8 Cir., 191 F. 2d 739, 741, where it said:

> "This Court has repeatedly ruled that it will accept the considered views of a District Judge as to doubtful questions of local law. Many of the cases in this Court and the Supreme Court which support that rule will be found in the case of *Buder v. Becker*, 8 Cir., 185 F. 2d 311, 315-316. In *Western Casualty & Surety Co. v. Coleman*, 8 Cir., 186 F. 2d 40, 43, we said: 'The burden of demonstrating error is upon the Casualty Company. In a case controlled by local law, that burden is a peculiarly heavy one. This Court is not an appellate court of the State of Missouri and establishes no rules of law for that State. We have repeatedly said that, in reviewing doubtful questions of local law, we would not adopt views contrary to those of the trial judge

unless convinced of error, and that all that this Court reasonably can be expected to do in such cases is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the local law. *Russell v. Turner*, 8 Cir., 148 F. 2d 562, 564; *Buder v. Becker*, 8 Cir., 185 F. 2d 311, 315, and cases cited. If a federal district judge has reached a permissible conclusion upon a question of local law, we will not reverse, even though we may think the law should be otherwise.' " (Opinion, p. 8 following R. 91)

The rule of practice whereby the Court of Appeals accepts a "permissible conclusion" of the District Court was apparently first announced by the Court of Appeals for the Eighth Circuit in the case of *Magill v. Travelers Ins. Co.*, 8 Cir., 133 F. 2d 709. It is respectfully submitted that the rule announced in that case originated in the failure of the court to distinguish between the duty of a court of appeals on an appeal and the discretion allowed the Supreme Court of the United States to either consider or refuse to consider the question upon a writ of certiorari. This court has frequently stated that it will not reverse the judgment of a court of appeals on a matter of state law without a definite conviction of error in that judgment. *Helvering v. Stuart*, 317 U. S. 154, 163; *MacGregor v. State Mutual Life Assur. Co.*, 315 U. S. 280, 281; *Spiegel's Estate v. Commissioner*, 335 U. S. 701, 707, 708. In the three cases cited the litigants had already had the benefit of a full review of the law applicable to their cases by an appellate court and the rule of this Court seems predicated upon the fact that this full review had already been made. Petitioner urges that in the instant case, and as a matter of practice, the Court of Appeals for the Eighth Circuit in adopting without independent inquiry a "permissible conclusion" of the District Court

has wrongfully assumed for itself, with relation to a district court's conclusion on a matter of local law, the same deference with which this Court, as a matter of discretion, favors the conclusions of a court of appeals on a matter of local law. The result of this practice is that the district court becomes, contrary to law and custom, not the initial but the final arbiter on all questions of local law.

The Court of Appeals for the Eighth Circuit in applying its rule that it will accept the "permissible conclusion" of the district court on a doubtful question of state law places the same burden upon the appellant to prove that the District Court erred on a question of law as the appellant would have in attempting to show that the district court erred in a finding of fact. Petitioner submits that this puts a burden on an appellant substantially greater than he should have under general rules of law governing appellate review of a question of law. The Court of Appeals for the Eighth Circuit in referring to an appeal on a question of fact stated in *Noland v. Buffalo Ins. Co.*, 8 Cir., 181 F. 2d 735, 738:

> "This court will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court."

The Court of Appeals for the Eight Circuit in speaking of its rule in regard to "permissible conclusions" of a district court stated in the case of *Kimble v. Willey*, 8 Cir., 204 F. 2d 238, 243:

> "We conclude that the decision of the district court is supported by available authority. But even in the absence of such authority this court will not in this case substitute its judgment for that of the District Court."

In referring to an appeal on a question of fact, the Court of Appeals stated in *Bettinger v. Northwestern Nat. Cas. Co.*, 8 Cir., 213 F. 2d 200, 205:

> "The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. * * * This Court has consistently ruled that a finding of fact is not clearly erroneous unless it is without adequate evidentiary support or results from a misconception or misapplication of the law."

In the instant case, the Court of Appeals said in its Opinion:

> "Unless it can be demonstrated that Judge Graven clearly misconceived or misapplied the applicable Iowa law in reaching his conclusion that the plaintiff had made a case for the jury, the judgment must be affirmed." (Opinion, p. 7 following R. 91)

A comparison of the statements made by the Court of Appeals in regard to reviewing questions of fact and in regard to reviewing questions of state law clearly demonstrate that the Court of Appeals is in truth and in fact applying one and the same rule to both types of appeals. Petitioner acknowledges that under the general rules of law governing appellate review of a finding of fact the appellate court merely looks to determine if there was sufficient evidence to support such a finding. In this type of case the appellate court will not substitute its own judgment for that of the trial court. Petitioner submits, however, that an appellate court is bound to substitute its judgment for that of a district court and to follow its own judgment on a question of law properly presented to it by an appellant. The failure to do so is a complete departure from the accepted and usual course of judicial proceedings whether the applicable

law is the result of a federal statute or the result of decisions of a state supreme court.

The rule of practice complained of, in addition to denying petitioner her right to a meaningful appeal, is also contrary to the practice and custom of the other circuits, where without exception it is the rule that when confronted with a doubtful question of local law in a diversity case the court of appeals exercises and enforces its independent judgment concerning the applicable local law. Thus see: First Circuit: *Boston Casualty Co. v. Bath Iron Works Corp.*, 136 F. 2d 31, 33; Second Circuit: *Cooper v. American Airlines*, 149 F. 2d 355, 357, 358; *Janes v. Sackman Bros. Co.*, 177 F. 2d 928, 932, 933; Third Circuit: *Barrett v. Denver Tramway Corp.*, 146 F. 2d 701, 702; *Hopkins v. E. I. Du Pont De Nemours & Co.*, 199 F. 2d 930; Fourth Circuit: *New England Mutual Life Insurance Co. v. Mitchell*, 118 F. 2d 414, cert. denied 314 U. S. 629; Fifth Circuit: *Holliday v. Wade*, 117 F. 2d 154, 156; *Fakouri v. Cadais*, 149 F. 2d 321, 323; Sixth Circuit: *Egyptian Supply Co. v. Boyd*, 117 F. 2d 608, 612; Seventh Circuit: *Chicago, Wilmington and Franklin Coal Co. v. Herr*, 127 F. 2d 1010; Ninth Circuit: *Hughes v. Mutual Life Insurance Co.*, 180 F. 2d 542, 545; *Republic Pictures Corp. v. Rogers*, 213 F. 2d 662, 664, 665; Tenth Circuit: *Versluis v. Town of Haskell*, 154 F. 2d 935, 937; *Kansas City Public Service Co. v. Knight*, 116 F. 2d 233.

Since its formulation in *Magill v. Travelers Ins. Co.*, 133 F. 2d 709, the Court of Appeals for the Eighth Circuit has followed in more than thirty cases its practice of deferring to the judgment of the district courts.* This difference and conflict of practice among the circuits is a substantial problem in the administration of justice worthy of the at-

* See Appendix pages 15 and 16.

tention of this Court whose own pronouncements petitioner submits have been consistently contrary to the rule followed by the Eighth Circuit: *Huddleston v. Dwyer*, 322 U. S. 232; *Wichita Royalty Co. v. City Nat. Bank*, 306 U. S. 103; *Meredith v. Winter Haven*, 320 U. S. 228; *Williams v. Green Bay & W. R. Co.*, 326 U. S. 549.

In the *Huddleston* case, at l. c. 236, the court said:

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie R. Co. v. Tompkins*, 304 U. S. 64; Federal Rules of Civil Procedure, Rules 69(a), 81(b), 28 U. S. C., following Sec. 723(c). It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case it controls decision. *Meredith v. Winter Haven*, 320 U. S. 228."

Petitioner argued in the instant case that certain Iowa decisions controlled the outcome. The district judge held that they did not. It is respectfully submitted that on appeal petitioner was entitled to an independent determination of the controlling local law, whether ascertained from cases decided during the appeal or twenty years prior thereto. *West v. American Teleph. & Teleg. Co.*, 311 U. S. 223. In failing to make such a determination the Court of Appeals for the Eighth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III

The Decision of the Court of Appeals for the Eighth Circuit in the Case at Bar is in Conflict With Decisions in Other Circuits and Particularly With the Decisions in *Mangol v. Metro-*

***politan Life Ins. Co.*, 7 Cir., 103 F. 2d 14; *Grand Trunk Western Co. v. H. W. Nelson Co.*, 6 Cir., 118 F. 2d 252 and *Fakori v. Cadais*, 5 Cir., 149 F. 2d 321.**

The trial court refused to follow controlling decisions of the Supreme Court of Iowa and based its decision on a forecast as to what the Supreme Court of Iowa "would hold" in the future on the theory that it could discern a "trend" from recent decisions on different facts. The Court of Appeals for the Eighth Circuit affirmed by application of its rule that it would not review the decision of the trial court on "doubtful" questions of state law.

It is submitted that these rulings are in direct conflict with the decisions of the Courts of Appeal of other Circuits which have held that controlling decisions which have not been overruled may not be ignored on the basis of forecasts and predictions derived from "trends." *Mangol v. Metropolitan Life Ins. Co.*, 7 Cir., 103 F. 2d 14; *Grand Trunk Western Co. v. H. W. Nelson Co.*, 6 Cir., 118 F. 2d 252, certiorari denied in 297 U. S. 717; *Fakori v. Cadais*, 5 Cir., 149 F. 2d 321, certiorari denied in 326 U. S. 742. See also *Toolson v. New York Yankees*, D. C. Cal., 101 F. Supp. 93, 200 F. 2d 198, and *Kowalski v. Chandler*, 6 Cir., 202 F. 2d 413, both affirmed in *Toolson v. New York Yankees*, 346 U. S. 356.

The conflict is illustrated by the decision in *Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 6 Cir., 118 F. 2d 253, wherein the Court of Appeals for the Sixth Circuit stated at page 254:

> "None of the Michigan cases on the subject of interest have been expressly overruled, but all are extant. The rule prevails that where a question has been decided

> expressly in an earlier case which has not been modified, the fact that in later cases involving similar, but different, questions, the reasoning seems to indicate a changed view is not justification for a departure from the rule earlier laid down.
>
> "None of the cases cited by appellee makes qualifying references to the Coburn, Nelson or Lucas cases. The decisions in those cases were concerned with questions closely analogous to the one here raised and as none of them has been overruled, we may not disregard them upon the theory that they are inconsistent with adjudications of questions in later cases somewhat similar."

It is submitted that there is conflict between the decision of the Court of Appeals for the Eighth Circuit in the case at bar and the decisions of the Courts of Appeal for the Fifth, Sixth, and Seventh Circuits. This conflict should be resolved. There is a complete abdication of judicial function when the trial court refuses to follow controlling state court decisions on the theory that it can discern a "trend," and the Court of Appeals refuses to review an issue of law on appeal out of deference to the views of the trial court. The Rules of Decision Act, 28 U. S. C. 1652 and the doctrine of *Erie Railroad Co. v. Thompkins*, 304 U. S. 64, are thereby nullified.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,015

Minnie M. Guyer,
Appellant,

vs.

Carol E. Elger, Administratrix of the Estate of George Elger, Deceased; and Carol E. Elger, Administratrix of the Estate of Sylvia E. Elger, Deceased,
Appellees.

Appeal from the United States District Court for the Northern District of Iowa.

[November 9, 1954]

Harry E. Wilmarth (Matthew H. Czizek, Robert M. Czizek, Caryl W. Garberson, Czizek & Czizek and Elliott, Shuttleworth & Ingersoll were with him on the brief), for Appellant.

E. Marshall Thomas (Edward A. McDermott and O'Connor, Thomas, McDermott & Wright were with him on the brief), for Appellees.

Before SANBORN, WOODROUGH and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge.

Minnie M. Guyer, a citizen of Iowa, on February 5, 1953, at about noon, while driving her Cadillac automobile east on Highway 64 toward Maquoketa, Iowa, had a collision with a Ford automobile traveling west and being driven by George Elger, of Chicago, Illinois, who was accompanied by his wife. The cars met head on at a point on the highway about four miles west of Maquoketa. The Elgers were killed. Mrs. Guyer was alone in her car and was the only surviving witness of the accident. She was seriously injured.

The collision was due to one of two causes: either Mrs. Guyer had suddenly turned her car into the north lane of the highway on which the Elger car was traveling west or George Elger had suddenly driven his car into the south lane of the highway on which the Guyer car was traveling east. The paved portion of the highway was 18 feet in width. If each of the cars had remained in its proper lane, no collision could have occurred.

The administratrix of the estates of the Elgers, a citizen of Illinois, brought this action against Mrs. Guyer to recover damages for their deaths upon the claim that Mrs. Guyer had negligently driven her car into the north lane of the highway and caused the accident. Mrs. Guyer denied that she had been negligent, and asserted that George Elger had negligently turned his car into the south lane of the highway, thus causing the collision. She counterclaimed for her damages.

The issues were tried to a jury. At the close of the evidence, the defendant (appellant) moved for a directed verdict in her favor on the ground that the plaintiff (appellee) had not made a case for the jury. The motion was denied, and the jury returned verdicts for the plaintiff, upon which

judgment was entered. The defendant moved for judgment notwithstanding the verdicts. Her motions were denied, and she has appealed from the judgment.

The sole question for review is whether, under the applicable law of Iowa, the plaintiff's evidence was sufficient to make the issue of liability one for the jury.

The defendant's testimony was: That she left her home just outside of the village of Nashville, Iowa, approximately half a mile south of Highway 64, at about twenty minutes before noon; that she entered the highway a mile east of the Nashville road; that it was a misty morning and was drizzling; that she had the windshield wipers of her car going; that the highway easterly from the point where she entered it curves through a rock cut; that she proceeded through this cut where the highway straightens out and slopes slightly to the east; that, as she passed through the cut, she observed a car approaching from the opposite direction; that she was driving on the south side of the highway, south of the black line marking its center; that the car approaching her seemed to be traveling at about the same speed as her car, 50 to 55 miles an hour; that each car was on its own side of the highway; that: "He [the driver of the approaching car] kept coming west and I kept going east, and we continued that way until we were quite close together and then all of a sudden he just like that (indicating) came right over. I mean he would have turned to his left and come at an angle right at me. He was angling from the north to the south side of the road. He was heading southwest. I couldn't tell you in feet how far ahead of me he was when he angled into my lane. I know just how long it took for him when I saw him starting across. I slammed on the brakes and I said, 'Oh, Oh, Oh' and he hit me. I remember distinctly saying 'Oh' three times, and that

is everything that I remember. I don't know whether my car responded to the brakes. I know that I didn't apply the brakes but I slammed them on instinctively, and I don't think that I had time for the brakes to act on the wheel, because it just quivered and outside of that I don't know. There wasn't time to do anything. I was traveling on the south side at that time. I did not see any pool of water any place on the highway that day. Nothing affected my operation of the car. I am not conscious of whether I pulled my car to the left at the time I applied my brakes. I remember slamming on the brakes and saying those three 'Oh's' and the car quivered. I slammed on the brakes so hard that it may have pulled it to the right or I may have pulled it to the left, but I am not conscious of it. The brakes were in good condition because I had relined them that summer and they had been set up and readjusted either in October or November."

The evidence on behalf of the plaintiff was necessarily circumstantial. There was virtually no dispute about the position of the cars after the accident. The cars came to rest about 12 feet apart. The Ford was east of the Cadillac and completely off the north edge of the traveled portion of the highway, facing in a northeasterly direction. The Cadillac — much the heavier of the two cars (3,980 pounds as against 3,110 pounds) — was facing slightly west of north, blocking the north lane of the highway. All of the Cadillac except the rear bumper and a small portion of the trunk was north of the middle of the highway. The front end of the Cadillac was on the embankment or north shoulder of the highway.

There was evidence that "Most of the mud and stuff, that was knocked off under the cars, was underneath the Cadillac" and was north of the center line of the highway. There

was evidence that it had rained intermittently all morning and was raining at the time of the accident, and that there was a pool of water 2 or 2½ inches deep on the highway, about 30 feet west of the Cadillac; that the pool covered the pavement and extended west about 24 feet. There was no evidence with respect to tire marks on the pavement (possibly due to rain), and no evidence of the existence of any obstruction or condition of the highway east of the point of collision which could or might have caused the driver of the Ford car suddenly to turn his car from the north lane into the south lane of the highway. On the other hand, there was evidence that a short distance west of the point of collision there was the pool of water 2 to 2½ inches deep on the highway, which could or might have caused an eastbound car to swerve from the south lane into the north lane. The disconcerting effect of driving a car at high speed through a pool of water on a highway has been experienced by most motorists. It seems to us that, from a practical point of view, the facts and circumstances disclosed by the evidence, viewed in the light most favorable to the plaintiff, are more consistent with the hypothesis that the driver of the Cadillac suddenly swerved into the north lane of the highway than with the hypothesis that the Ford suddenly veered into the south lane.

Had the Ford, traveling southwest, as the defendant testified, struck the front of the Cadillac in the south lane of the highway, one reasonably might believe that the Cadillac would necessarily have been turned toward the south, and not toward the north, and would have come to rest either in the south lane of the highway or south of that lane off the highway, and that most of the debris dropped from the cars upon impact would have been in the south and not in the north lane.

Counsel for the defendant, however, are convinced that if this case was before the Supreme Court of Iowa, it would hold that the plaintiff's evidence was insufficient to sustain the verdicts and judgment, and would reverse. Counsel for the plaintiff are as firmly convinced that the Supreme Court of Iowa would hold the evidence sufficient to make the issue of liability one for the jury, and would affirm. Counsel on both sides are Iowa lawyers. They have at least demonstrated that the question of the sufficiency of the evidence is a debatable one.

The case was tried before Judge Graven, of the Northern District of Iowa, who, previous to his appointment to the federal bench, had been an experienced State District Judge in Iowa. His considered views are stated in a memorandum accompanying his order denying the defendant's motions for judgment notwithstanding the verdicts. We quote the following excerpts from this memorandum:

"The Iowa Supreme Court has followed two rules in connection with circumstantial evidence in civil cases. For a considerable period of time it followed the so-called 'exclusion of every other hypothesis rule' frequently referred to as the strict rule as contrasted with the so-called 'more reasonably probable rule' frequently referred to as the liberal rule. Then for a period of time that Court wavered between the two rules. However, in recent years that Court has consistently followed and applied the latter rule.

"Ever since the Iowa Supreme Court handed down its decision in the case of *Smith v. Darling & Co.* [56 N.W. 2d 47 (1952)], the scope and the implications of the opinion and the holding in that case have been a subject of discussion among those having to do with Iowa motor vehicle collision litigation. In civil jury cases involving circumstantial evidence it was and is argued to the trial courts in Iowa by counsel contending for submission that in addition to following the liberal rule as to circumstantial evidence

the Iowa Supreme Court has manifested an increasingly liberal attitude in favor of submissibility and that the case of *Smith v. Darling & Co.* is indicative of that attitude. However, counsel arguing to those courts against submission argue that too much is claimed by the opposing counsel for the holding and the opinion of the Iowa Court in that case and that that case is distinguishable on the facts from the particular case under consideration and from other Iowa cases involving circumstantial evidence in civil cases.

* * * * * * * *

"Fairly recently three different Iowa trial judges have been reversed by the Iowa Supreme Court for being too strict in the matter of submissibility in tort actions where the plaintiffs relied upon circumstantial evidence. Those reversals were in the cases of *Smith v. Darling & Co., supra; Roller v. Independent Silo Co.* (1952), 42 N.W. 2d 838; and *Nicholson v. City of Des Moines, supra* [Iowa Sept. 22, 1953, 60 N.W. 2d 240].

"This Court is of the view that the trend of the decisions of the Iowa Supreme Court in civil cases in which circumstantial evidence is involved has been in favor of submissibility and away from the somewhat more strict views expressed and somewhat more strict attitude indicated in the earlier cases.

"While, as heretofore noted, the question of submissibility in the present case is a close one, yet the Court is of the view that under the present state of the Iowa law the Iowa Supreme Court would hold that under the evidence in this case the question as to whether or not the defendant invaded the traffic lane of George Elger was properly one for jury determination."

Unless it can be demonstrated that Judge Graven clearly misconceived or misapplied the applicable Iowa law in reaching his conclusion that the plaintiff had made a case for the jury, the judgment must be affirmed. We again repeat what we said in *National Bellas Hess, Inc. v Kalis*, 8 Cir., 191 F. 2d 739, 741, relative to this Court substituting

its judgment for that of a trial judge respecting a doubtful question of local law:

"This Court has repeatedly ruled that it will accept the considered views of a District Judge as to doubtful questions of local law. Many of the cases in this Court and the Supreme Court which support that rule will be found in the case of *Buder v. Becker*, 8 Cir., 185 F. 2d 311, 315-316. In *Western Casualty & Surety Co. v. Coleman*, 8 Cir., 186 F. 2d 40, 43, we said: 'The burden of demonstrating error is upon the Casualty Company. In a case controlled by local law, that burden is a peculiarly heavy one. This Court is not an appellate court of the State of Missouri and establishes no rules of law for that State. We have repeatedly said that, in reviewing doubtful questions of local law, we would not adopt views contrary to those of the trial judge unless convinced of error, and that all that this Court reasonably can be expected to do in such cases is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the local law. *Russell v. Turner*, 8 Cir., 148 F. 2d 562, 564; *Buder v. Becker*, 8 Cir., 185 F. 2d 311, 315, and cases cited. If a federal district judge has reached a permissible conclusion upon a question of local law, we will not reverse, even though we may think the law should be otherwise.' "

See, also, *Kimble v. Willey*, 8 Cir., 204 F. 2d 238, 243; and compare *Russell v. Turner*, 8 Cir., 148 F. 2d 562, 564; *Northern Liquid Gas Co. v. Hildreth*, 8 Cir., 180 F. 2d 330, 336; *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 8 Cir., 203 F. 2d 859.

We have read and considered the opinions in the Iowa cases relied upon by counsel for the parties.[1] We shall not attempt any analysis or reconciliation of them in this

[1] *Reimer v. Musel*, 217 Iowa 377, 251 N.W. 863; *Vandell v. Roewe*, 232 Iowa 896, 6 N.W. 2d 295; *Potter v. Robinson*, 233 Iowa 479, 9 N.W. 2d 457; *Hayes v. Stunkard*, 233 Iowa 582, 10 N.W. 2d 19; *In re Goretska's Estate*, 234 Iowa 1080, 13 N.W. 2d 432; *Smith v. Darling & Co.*, 244 Iowa 133, 56 N.W. 2d 47; *Hackman v. Beckwith*, Iowa , 64 N.W. 2d 275.

opinion. We think that the cases of *Smith v. Darling & Co.*, 244 Iowa 133, 56 N.W. 2d 47, and *Hackman v. Beckwith*, .. Iowa . . , 64 N.W. 2d 275, support the views expressed by Judge Graven. We note that in the *Hackman* case, the Supreme Court of Iowa said, at page 279 of 64 N.W. 2d:

" * * * Practically all the debris came from appellants' truck, which some evidence shows careened on down the road from the point of collision to its final resting place. In any event, the deductions to be made from the positions of the vehicles as they come to rest after an accident, the tracks found on the roadway, and the location of dirt and debris from collisions, are ordinarily for the jury. *Slabaugh v. Eldon Miller, Inc.*, Iowa, 55 N.W. 2d 528."

The fact that in the instant case there was an absence of evidence of tire marks would not, in our opinion, make this rule inapplicable.

Our conclusion is that Judge Graven reached a permissible conclusion, and probably the correct one, in determining that the issue of liability in this case was, under Iowa law, one of fact for the jury and not one of law for the court, and that his ruling in that regard was not induced by any misconception or misapplication of Iowa law.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

MEMORANDUM OF DISTRICT COURT

The evidence in the present case and the cases relied upon by the parties have been so fully and thoroughly discussed in the excellent briefs filed in behalf of the plaintiffs and the defendant that the Court feels that only a short memorandum in connection with the ruling should be made.

In this case the issues of negligence on the part of the defendant, freedom from contributory negligence on the part of the decedents, and proximate cause are dependent upon whether the defendant's automobile or George Elger's automobile was on the wrong side of the highway immediately prior to and at the time of the collision. It is obvious that either George Elger invaded the traffic lane of the defendant or that the defendant invaded the traffic lane of George Elger. The pivotal question presented by [fol. 109] the defendant's motion for a directed verdict and its motion for judgment notwithstanding the verdicts is whether the Iowa Supreme Court would hold that the evidence was such as to warrant a finding by the jury that the defendant invaded the traffic lane of George Elger.

In recent Iowa case of Smith vs. Darling & Co., (1952) 56 N. W. 2d 47 is discussed at length in the briefs of the parties. In that case the Iowa Supreme Court held that the question of whether the driver of the defendant's motor vehicle invaded the traffic lane of the plaintiff should have been submitted to the jury by the trial court. The Iowa Court stated that the question of submissibility was a close one. In the present case the question of submissibility is also a close one.

The Iowa Supreme Court has followed two rules in connection with circumstantial evidence in civil cases. For a considerable period of time it followed the so-called "exclusion of every other hypothesis rule" frequently referred to as the strict rule as contrasted with the so-called "more reasonably probable rule" frequently referred to as the liberal rule. Then for a period of time that Court wavered between the two rules. However, in recent years that Court has consistently followed and applied the latter rule.

Ever since the Iowa Supreme Court handed down its decision in the case of Smith vs. Darling & Co., the scope and the implications of the opinion and the holding in that case [fol. 110] have been a subject of discussion among those having to do with Iowa motor vehicle collision litigation. In civil jury cases involving circumstantial evidence it was and is argued to the trial courts in Iowa by counsel contending for submission that in addition to following the liberal rule as to circumstantial evidence the Iowa Supreme Court has manifested an increasingly liberal attitude in favor of submissibility and that the case of Smith vs. Darling & Co. is indicative of that attitude. However, counsel arguing to those courts against submission argue that too much is claimed by the opposing counsel for the holding and the opinion of the Iowa Court in that case and that that case is distinguishable on the facts from the particular case under consideration and from other Iowa cases involving circumstantial evidence in civil cases.

It is the view of this Court that if the present views and attitude of the Iowa Supreme Court as to submissibility in civil cases involving circumstantial evidence were the same

as the views expressed and attitude shown in the earlier cases, such as the case of Reimers vs. Musel (1933) 217 Iowa 377, 251 N. W. 863, that that Court would hold that the evidence in the present case did not warrant the submission to the jury of the question here involved.

[fol. 111] The recent case of Slabaugh et al v. Eldon Miller, Inc. (1952) 55 N. W. 2d 528 involved the question of invasion of traffic lane. One of the plaintiffs and a companion testified directly as to such invasion by the driver of the defendant's vehicle. The jury verdict was in favor of the plaintiffs. On appeal the defendant argued that the "physical facts" were such that the trial court should have directed a verdict in its favor. One of the "physical facts" relied upon by the defendant was the position of the vehicles following the collision. In discussing that matter the Court stated (p. 530 N. W. 2d):

> "* * * How motor vehicles will rebound after a collision is something no one can definitely say. A car, or truck, which is clearly upon the left-hand side may be driven back upon its own proper part of the highway by the force of the collision, and conversely the one which is struck while lawfully in its own lane may rebound across the pavement to the left side. Granted that there is room for argument that this is unlikely, and that some weight may be attached to the positions of the vehicles as they come to a stop after colliding, we think whatever that weight may be is ordinarily a question for the jury."

The case of Nicholson v. City of Des Moines (Iowa Sept. 22d, 1953) 60 N. W. 2d 240, involved the question of the sufficiency of evidence as to proximate cause in a case where the personal representative of one Vincent sought to re-

cover damages for his death because of the claimed negligence of the defendant city in the matter of guarding and lighting a cinder path leading towards a bridge. The evi- [fol. 112] dence of the plaintiff showed that Vincent, a man seventy-two years of age, was last seen alive at 11:30 P.M. on March 24, 1952, at which time he was walking towards the bridge three blocks away and that on the morning of March 25, 1952, he was found dead in a pit in the vicinity of the bridge which was 12 to 14 feet from the cinder patch and that his death had been caused by his falling into the pit. No one saw Vincent from the time he was three blocks away from the bridge. It was held by a divided court (6 to 3) that the circumstantial evidence was sufficient to require the submission of the case to the jury, and the action of the trial court in directing a verdict in favor of the defendant city was reversed. There was a vigorous dissenting opinion in that case in which it is stated (p. 250 N. W. 2d):

> "The basis for this dissent can be summarized by stating it is my conclusion under the rules of law heretofore announced by this court and other authorities the facts disclosed by the evidence in this case do not justify their submission to a jury for their determination."

Fairly recently three different Iowa trial judges have been reversed by the Iowa Supreme Court for being too strict in the matter of submissibility in tort actions where the plaintiffs relied upon circumstantial evidence. Those reversals were in the cases of Smith v. Darling & Co., supra; Roller v. Independent Silo Co. (1952) 49 N. W. 2d 838; and Nicholson v. City of Des Moines, supra.

[fol. 113] This Court is of the view that the trend of the

decisions of the Iowa Supreme Court in civil cases in which circumstantial evidence is involved has been in favor of submissibility and away from the somewhat more strict views expressed and somewhat more strict attitude indicated in the earlier cases.

While, as heretofore noted, the question of submissibility in the present case is a close one, yet the Court is of the view that under the present state of the Iowa law the Iowa Supreme Court would hold that under the evidence in this case the question as to whether or not the defendant invaded the traffic lane of George Elger was properly one for jury determination.

HENRY N. GRAVEN,
United States District Judge.

Eighth Circuit cases where "permissible conclusion" was accepted:

Doering v. Buechler, 8 Cir., 146 F. 2d 784
Railway Mail Ass'n v. Chamberlin, 8 Cir., 148 F. 2d 206
Russell v. Turner, 8 Cir., 148 F. 2d 562
Globe Indemnity Co. v. Wolcott & Lincoln, Inc., 8 Cir., 152 F. 2d 545
Anderson-Tully Co. v. Murphree, 8 Cir., 153 F. 2d 874
Michigan Fire & Marine Ins. Co. v. National Surety Corp., 8 Cir., 156 F. 2d 329
Central Nebraska Public Power & Irrigation Dist. v. Tobin Quarries, Inc., 8 Cir., 157 F. 2d 482
Abbott v. Arkansas Utilities Co., 8 Cir., 165 F. 2d 339
Turner County, S. D. v. Miller, 8 Cir., 170 F. 2d 820
Zuckerman v. McCulley, 8 Cir., 170 F. 2d 1015
Heikes v. New York Life Ins. Co., 8 Cir., 171 F. 2d 460
Mast v. Illinois Cent. R. Co., 8 Cir., 176 F. 2d 157
Traders & General Ins. Co. v. Powell, 8 Cir., 177 F. 2d 660
Brink's Inc. v. Hoyt, 8 Cir., 179 F. 2d 355
Northern Liquid Gas Co. v. Hildreth, 8 Cir., 180 F. 2d 330
Morgan v. Finnegan, 8 Cir., 182 F. 2d 649
Nolley v. Chicago, M., St. P. & P. R. Co., 8 Cir., 183 F. 2d 566
Buder v. Becker, 8 Cir., 185 F. 2d 311
Western Casualty & Surety Co. v. Coleman, 8 Cir., 186 F. 2d 40
National Bellas Hess, Inc. v. Kalis, 8 Cir., 191 F. 2d 739
Franck v. Equitable Life Ins. Co., 8 Cir., 203 F. 2d 473
Coca Cola Bottling Co. of Black Hills v. Hubbard, 8 Cir., 203 F. 2d 859
Kimble v. Willey, 8 Cir., 204 F. 2d 238
Illinois Terminal R. Co. v. Creek, 8 Cir., 207 F. 2d 475
Nordin v. May, 8 Cir., 208 F. 2d 131
Barnard v. Wabash R. Co., 8 Cir., 208 F. 2d 489
Madison County Farmers Ass'n v. American Emp. Ins. Co., 8 Cir., 209 F. 2d 581
Michealson v. Elliott, 8 Cir., 209 F. 2d 625
Western Auto Supply Co. v. Sullivan, 8 Cir., 210 F. 2d 36
Kansas City Public Service Co. v. Taylor, 8 Cir., 210 F. 2d 3

Pacific Emp. Ins. Co. v. Nance, 8 Cir., 212 F. 2d 4
Riteway Carriers v. Stuyvesant Ins. Co., 8 Cir., 213 F. 2d 576
Clarke Hybrid Corn Co. v. Stratton Grain Co.,
8 Cir., 214 F. 2d 7

(This is only a partial list of cases on this point)

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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

No. 496

MINNIE M. GUYER,

Petitioner,

vs.

CAROL E. ELGER, ADMINISTRATRIX OF THE ESTATE OF GEORGE ELGER, DECEASED; AND CAROL E. ELGER, ADMINISTRATRIX OF THE ESTATE OF SYLVIA E. ELGER, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, Carol E. Elger, Administratrix of the Estates of George Elger and Sylvia E. Elger, deceased, respectfully prays that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit entered November 9, 1954 be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case omits the following important facts:

The jury not only returned a verdict for plaintiff but also returned a verdict against the petitioner on her counterclaim for personal injuries (R. 77).

The accident occurred about noon on February 5, 1953 (R. 50). It rained intermittently all that morning (R. 25). Petitioner admitted that it was a misty morning and was drizzling and that she had her windshield wipers going (R. 35).

The damage to each car was at the front end (Exhibits D, E, & F; R. 8, 15, 17, 19). When the cars were at rest after the accident they were only 12 feet apart (R. 21-24) (Exhibit C; R. 8, 13). Decedents' car after the accident was on the shoulder of the highway beside the decedents' proper lane of travel (Exhibits A, B, & C; R. 8, 9, 11 & 13). After the accident the petitioner's car, except for the rear bumper, was completely in decedents' proper lane of travel (Exhibits A, B & C; R. 8, 9, 11 & 13).

Virtually all of the dirt and debris was entirely North of the center of the two lane paved highway, in the Westbound traffic lane in which the decedents were traveling (R. 22; Exhibits A, B; R. 8, 9 & 11) and "most of the mud and stuff, that was knocked off under the car, was underneath the Cadillac" (R. 22). One witness testified that a portion of a bumper was in the South lane of the highway (R. 49) and one witness stated there were a few pieces of bumper on the North side of the road (R. 26).

Sheriff Felderman (R. 22), Iowa Highway Patrolman, Maiony (R. 24), newspaper photographer, Grady (R. 25)

and two other disinterested witnesses Mr. Ehl (R. 26) and Mr. Wierup (R. 28) testified that a pool of water 2 to 2½ inches deep covered the entire width of the pavement for a distance of 25 to 30 feet East and West a short distance West of where petitioner's Eastbound Cadillac came to rest. Mrs. Schelemmer, a farm wife living immediately South of where the accident happened saw cars at 11:30 A.M. prior to the accident splash through the pool of water (R. 50). A part of this pool of water appears in the foreground in Exhibit B (R. 8, 11) according to the testimony of the photographer (R. 25).

This water accumulated because there was no drainage at this point in the highway and the dirt shoulders were three or four inches higher than the level of the pavement (R. 22, 24). The measurements of petitioner's engineer with reference to differences in elevation of the highway at the low point does not contradict or impeach the testimony of witnesses concerning the presence of the water on the highway because the measurements and testimony of the engineer were limited to the cement highway and excluded any consideration of the elevation of the shoulders of the highway (R. 41). *Petitioner did not see this accumulation of water on the highway* before, while or after passing through it (R. 36). Petitioner was traveling 50 to 55 miles per hour (R. 35).

Just before the collision the petitioner attempted to apply the brakes and exclaimed Oh! Oh! Oh! (R. 36).

REASONS FOR DENYING THE WRIT

I.

THE OPINION OF THE CIRCUIT COURT OF APPEALS FOLLOWED AND APPLIED THE CONTROLLING IOWA LAW.

The submission of this case to the jury for determination was in accord with the law of Iowa and is conclusively supported by the following cases:

Hackman v. *Beckwith* (Iowa) 64 N. W. 2d 275 (1954);

Smith v. *Darling & Co.*, 244 Iowa 113, 56 N. W. 2d 47 (1952);

Hayes v. *Stunkard*, 233 Iowa 582, 10 N. W. 2d 19 (1943); and

Hawkins v. *Burton*, 225 Iowa 707, 281 N. W. 342 (1939).

The able and learned trial court said he was bound by *Smith* v. *Darling & Co., supra,* and therefore submitted the issue to the jury on the circumstantial evidence theory (R. 57). He made that determination before *Hackman* v. *Beckwith, supra* had been adjudicated. The Circuit Court of Appeals in the case at bar held that "the cases of *Smith* v. *Darling & Co.*, 244 Iowa 133, 56 N. W. 2d 47 and *Hackman* v. *Beckwith* ... Iowa ..., 64 N. W. 2d 275 support the views expressed by Judge Graven, 216 Fed. 2d 537, at 541.

The Supreme Court of Iowa held in the case of *Smith* v. *Darling & Co., supra,* that there was error in sustaining a motion for judgment notwithstanding the verdict and restored the jury verdict to the plaintiff. Yet petitioner claims that the *Smith* case sustains her position that the

issue here is not submissible. It is strangely similar to the view of the trial court in the *Smith* case expressed in its ruling sustaining the motion for judgment notwithstanding the verdict which the Supreme Court of Iowa reversed. For purpose of comparison, see Appendix to this brief, where said trial court's ruling is set forth. As the Supreme Court of Iowa rejected that opinion, so would it reject petitioner's contention in the case at bar.

Petitioner has atttempted to distinguish the *Smith* case, supra, from the case at bar. The chief ground of appellant's attempted distinction is that there was some evidence to indicate path of travel prior to collision. This claimed distinction was not made by the Supreme Court of Iowa, for it in fact rejected such a claim when it said in the *Smith* case, 244 Iowa 133 at 142, 56 N.W. 2d 47 at 52:

> "But we think it is not fatal to plaintiff's case that the exact position of the two vehicles or the exact manner in which they collided is not shown provided there is substantial evidence the collision occurred on decedent's side of the highway."

The driver and only passenger in respondent's car received fatal injuries in the collision. Respondent's evidence, although mostly circumstantial, was sufficient under the law of Iowa to warrant submission to the jury because it provided *substantial* evidence the collision occurred on decedent's side of the highway in accord with the touchstone of submissibility laid down in *Smith* v. *Darling,* supra. This substantial evidence was as follows:

(1) The photographs, Exhibits D, E, & F, (R. 8, 15, 17 & 19) and testimony (R. 35, 29, 30) show that this was a front end collision between two automobiles travelling in opposite directions. The damage to each car is at the front end. Clearly, neither automobile rolled over, nor was

there any sideswiping of the cars. By the nature of the damage to the front end of both cars, the collision was head-on, and this, when considered with the following evidence raises more than a reasonable probability that the petitioner invaded the decedents' side of the road.

(2) When the cars were at rest they were only 12 feet apart (R. 21, 24; Exhibit C; R. 8, 13). This fact, together with the nature of the impact above pointed out, indicates that the cars must have collided head-on and then bounced apart. Neither car apparently travelled any considerable distance after the moment of impact.

(3) The position of the cars at rest, together with the other facts here stated, clearly indicates the place on the highway where the collision took place. Decedents' car was on the shoulder of the highway beside the proper lane of travel (Exhibits A, B, & C; R. 8, 9, 11 & 13). Petitioner's car, with the exception of the rear bumper, was completely in decedents' lane of travel (Exhibit A, B & C; R. 8, 9, 11 & 13). This position of the cars at rest, together with the fact the cars were only 12 feet apart and together with the fact that it was a head-on collision, establish most strongly that the point of impact was in decedents' lane of travel.

(4) Mud, dirt and gravel debris were found under the petitioner's car where it came to rest (R. 22; Exhibit A & B; R. 8, 9, 11). This debris, with the exception of a small amount under the rear bumper of petitioner's car at the center of the highway, is entirely in the decedents' proper lane of travel and is directly underneath the petitioner's car (See Exhibits A & B). This fact has strong probative value that the impact, which jarred loose this debris, occurred near the point where the debris is found on decedents' side of the road.

(5) The evidence establishes the presence of a pool of water across the full width of the highway, 20 to 30 feet in length, and 2 to 2½ inches deep (R. 22, 24, 26, 28). The easterly edge of this pool of water was 20 to 30 feet West of petitioner's Cadillac car (R. 22, 24, 25, 26, 28). It is obvious that petitioner drove her car through this water, and she stated she failed to see this pool of water (R. 36). Although the center of the cement road was a half inch higher in the center than at the edge as testified by petitioner's engineer (R. 41, 43), the Sheriff and State Highway Patrolman testified that the earth shoulders were three or four inches higher than the cement road and there was no drainage from this low spot (R. 22, 24). The petitioner's engineer limited his testimony to differences in elevation of the pavement and did not dispute or contradict the evidence of the Sheriff and State Highway Patrolman with reference to the height of the shoulders above the pavement (R. 41). Mrs. Schlemmer saw cars splash through this pool of water prior to the accident (R. 50). The existence of this pool of water together with petitioner's admission of speed of 50 to 55 miles per hour (R. 30), the fact that she did not see it and yet drove through it furnishes an explanation of why the petitioner drove on the wrong side of the road and why she said Oh! Oh! Oh! (R. 36).

As Judge Sanborn said for the Circuit Court of Appeals in the Opinion below (216 Fed. 2d 537 at 539):

> "Had the Ford, traveling southwest, as the defendant testified, struck the front of the Cadillac in the south lane of the highway, one reasonably might believe that the Cadillac would necessarily have been turned toward the south, and not toward the north, and would have come to rest either in the south lane of the highway or south of that lane off the highway, and that most of the debris dropped from the cars upon impact would have been in the south and not in the north lane.

> "It seems to us that, from a practical point of view, the facts and circumstances disclosed by the evidence, viewed in the light most favorable to the plaintiff, are more consistent with the hypothesis that the driver of the Cadillac suddenly swerved into the north lane of the highway than with the hypothesis that the Ford suddenly veered into the south lane."

What the Supreme Court of Iowa said in *Smith* v. *Darling & Co.* (1952), 56 N. W. 2d 47, at 52 can truthfully be said in the case at bar:

> "We cannot avoid the conclusion there is substantial evidence here the vehicles collided on the north side of the center line. Study of the record, including the photographs certified to us, convinces us reasonable minds could fairly conclude this is more probable than the theory the vehicles collided on the south side of the roadway, as Sperfslage testified."

Under the *Smith* case, *supra,* the Court had to infer from the physical facts that the decedent turned to his left just prior to the collision. No other way could be found to explain the nature of the damage to the vehicles. However, the Court concluded that it could be inferred that such action on the part of the decedent was done in an emergency and thus this was not conclusive against plaintiff's claim. The Court in commenting on this aspect of the case states:

> "One circumstance that should be noticed in this connection is that while the principal damage to the semi was to the left front most of the damage to the panel was on its right side—its left side was not seriously damaged. This would indicate that the right side of the panel collided with the semi. This in turn would tend to show decedent turned to his left (south) before the collision occurred. However, we are not prepared to hold such conduct would be conclusive against plaintiff on the issue of freedom from contributory negligence.

> Such a maneuver may well have been made in an emergency, not of decedent's making, in an attempt to avoid a head-on collision at a time when nothing decedent could have done would have prevented the impact."

No such difficulty appears in the facts of the case at bar.

In addition, in the case at bar, there is the existence of the pool of water through which appellant traveled just prior to the accident (R. 22, 24, 25, 26, 28, 50). This furnishes a logical and reasonable basis for explaining why petitioner lost control of her car and traveled across the center line into decedents' lane of travel. The existence of this factor, together with the fact of a head-on collision, the cars coming to rest twelve feet apart, both on decedents' side of the highway, the concentrated accumulation of debris on the decedents' side of the road makes the case at bar considerably stronger than the *Smith* case.

Respondent has met the standard laid down in the *Smith* v. *Darling, supra,* for submitting these types of cases to the jury; i.e. there is substantial evidence the collision occurred on decedent's side of the highway. The crux of the matter is stated in *Smith* v. *Darling, supra,* as follows:

> "It must be admitted the question whether this case should have been submitted to the jury is close. It must also be admitted it is a matter of some speculation and conjecture as to the precise manner in which the collision occurred. But we think it is not fatal to plaintiff's case that the exact position of the two vehicles or the exact manner in which they collided is not shown provided there is substantial evidence the collision occurred on decedent's side of the highway."

Petitioner's statements to the contrary notwithstanding, it is not necessary to show the precise course of travel of petitioner's car prior to collision as long as there is substantial evidence that the collision occurred on Respondent's side of the highway.

Petitioner makes the same mistaken contention for the case of *Hackman* v. *Beckwith, supra,* as she does for *Smith* v. *Darling, supra.* True, there was evidence of marks on the highway in both these cases, but nowhere in the opinion of these cases is there any statement that if there be no evidence of skid marks there can be no submissible issue. All that is required is substantial evidence that the collision occurred on the plaintiff's side of the road. *It is petitioner's unwarranted deduction that there must be evidence of marks on the road or of the path of travel of the car prior to collision.*

The opinion in the *Hackman* case, *supra,* while recognizing that marks have evidentiary value also recognizes that such marks are not conclusive, and that there can be substantial evidence other than marks to show the collision occurred on decedent's side of the road. This appears from the following quote from the *Hackman case,* 64 N. W. 2d 275, 279, 280:

> "The appellants have furnished us with a quotation from *Shafer* v. *State,* 171 Md. 506, 189 A. 273, 274, which we thing appropriate here: 'Reliance upon such evidence (marks on the highway) alone for jurisdictional determination of movements leading to a collision * * * is beset with dangers, but there would seem to be no room for doubt that in some cases it might amount to proof of negligence.' We think this is such as case; *particularly when there is much other substantial evidence pointing in the same direction.** We stress the word "might" in the foregoing quotation; whether it does amount to such proof is for the jury to say: we hold no more than that."

The learned trial court did not have the benefit of the *Hackman* case, *supra,* when he overruled the motion for

*Italics supplied for emphasis.

directed verdict, but said case certainly confirms the correctness of his ruling.

Another case which supports the opinion below in the case at bar is *Hawkins* v. *Burton*, 225 Iowa 707, 281 N. W. 342 (1939). In this case plaintiff's car was going North and defendant's truck was going South. The bodies, debris and plaintiff's car were on plaintiff's side of road. Defendant claims plaintiff's car went to its left and was pulling back to the right at the time of impact. The court states at page 711 of 225 Iowa, that this claim "is hardly borne out by the position and condition in which the Chrysler was found after the accident." Plaintiff introduced no evidence as to course of travel of defendant's truck prior to the accident. Held: Court properly submitted to the jury the issues of defendant's failure to yield one-half the way, defendant's lack of control, and defendant's speed. The Court, at page 713 of 225 Iowa states:

> "Defendants complain of the submission of the first and third grounds of negligence, but we find no error here. The first had to do, as has been set out, with defendant's failure to turn the said truck to the right and give one-half of the traveled way. The circumstances surrounding the accident made it a jury question as to what the fact was. The condition of the car and of the truck, the location of the bodies, particularly that of Mrs. Cain, the fact that there was no debris west of the center of the highway, the location of the car door, and the blood and brains splattered on that side of the bridge, were circumstances from which the jury could have found defendant Burton negligent in the particulars charged."

Likewise, in the case at bar, petitioner's version of this accident "is hardly borne out by the position and condition in which the cars were found after the accident."

Hayes v. *Stunkard,* 233 Iowa 582, 10 N. W. 2d 19 (1943) also supports the correctness of submitting the case at bar to the jury for determination. Although this case involved a pedestrian, it is a strong case for submitting circumstantial evidence to the jury where there are two theories of causation. Petitioner and Respondent each claims the other invaded the wrong side of the road. Respondent's theory receives rational and reasonable support in the evidence, and therefore was properly submitted to the jury for determination.

The case of *In Re Estate of Goretska,* 234 Iowa 1080, 13 N. W. 2d 432 (1944) is a strong authority for submission of the issues to the jury in the case at bar. In this case there was a head-on collision, and all occupants were killed. After the jury verdict was returned in favor of the defendant, the trial court granted a new trial and this was held to be within the power of the trial court. Although there was little evidence to fix the point of impact, yet the court held it was not an abuse of discretion to allow the plaintiff a new trial. The *Goretska* case in no manner supports Petitioner's claim of non-submissibility.

Petitioner relies heavily on three Iowa cases which are clearly distinguishable. *Vandell* v. *Roewe* 232 Iowa 896, 6 N. W. 2d 295 (1942) was an action by a guest against host on the grounds of recklessness; what is required to make a jury issue on recklessness is far different than what is required on grounds of negligence. At page 901 of 232 Iowa the court summarized its holding:

> "We are satisfied that under our repeated pronouncements mere evidence that a collision occurred on the left-hand side of the road without more would not support a finding of recklessness under the guest statutes."

In *Potter* v. *Robinson,* 233 Iowa 479, 9 N. W. 2d 457 (1943) it clearly appears that plaintiff's evidence was

meager and very much less substantial than in the case at bar. In the Potter case, *supra,* it clearly appears: that when the vehicles came to rest, the defendant's truck was 70 to 90 feet from the plaintiff's car. Thus the position of the vehicles at rest did not give any accurate indication as to the point of impact. At least eight witnesses testified that all, or substantially all, of the debris was located in defendant's lane of travel. Plaintiff produced three witnesses who testified that the debris was partially in plaintiff's lane of travel, but the majority opinion of the Court holds because of impeachment on cross examination that the testimony of these three witnesses is of no probative value, and there were clearly definable tracks made by the defendant's truck, which tracks indicate, beyond doubt, that the truck was in its proper lane of travel at the time of impact. In spite of this evidence, three Judges join in a vigorous dissent based in part on the idea that there was sufficient evidence as to circumstances and physical facts to require submission of the case to the jury, which was prophetic of the present prevailing view of the Iowa Supreme Court.

The Supreme Court of Iowa, *Smith* v. *Darling & Co., supra,* states:

> "Under the rule to which we are firmly committed by many recent decisions the evidence must be such as to make plaintiff's theory of causation reasonably probable, not merely possible, and more probable than any other hypothesis based on such evidence. The evidence need not be so clear as to exclude every other possible theory."

The case of *Reimer* v. *Musel* 217 Iowa 377, 251 N. W. 862 (1833) which is heavily relied upon by Petitioner, no longer states the correct rule of Iowa law on this Point. *Reimer* v. *Musel, supra,* unequivocally states:

> "Where it is sought to establish by circumstantial evidence that the alleged negligenc is the proximate cause of the injury, such evidence must exclude every other reasonable hypothesis."

The *Reimer* case, *supra,* was decided in 1933 and is directly contradictory of the present Iowa law as expressed *in Smith* v. *Darling & Co., supra,* above.

The Iowa Court has vacillated between these two rules. Judge Graven in his ruling denying defendant's motion for judgment notwithstanding the verdict (R. 80, 81) stated:

> "The Iowa Supreme Court has followed two rules in connection with circumstantial evidence in civil cases. For a considerable period of time it followed the so-called 'exclusion of every other hypothesis rule' frequently referred to as the strict rule as contrasted with the so-called 'more reasonably probable rule' frequently referred to as the liberal rule. Then for a period of time that Court wavered between the two rules. However, in recent years that Court has consistently followed and applied the latter rule."

The confusion on this matter in the Iowa cases arose out of the erroneous application of the rule of circumstantial evidence in criminal cases, where the burden is to prove beyond a reasonable doubt, to civil cases where the burden is to prove by a fair preponderance of the evidence. For an explanation of this confusion see *Duncan* v. *Fort Dodge G. & E. Co.* 193 Iowa 1127, 188 N. W. 865 (1922); *Boles* v. *Hotel Maytag Co.* 218 Iowa 306, 253 N. W. 515 (1934); *Whetstine* v. *Moravec* 228 Iowa 352, 291 N. W. 425 (1940). While it may be true that the Supreme Court of Iowa had adopted the "more reasonably probable rule" prior to the *Reimer* case, *supra,* as corroborated by the three cases cited above in this paragraph, and is committed to said rule by many recent decisions, the *Reimer* case is

another illustration of the wavering of the Court between the two rules. No one can deny that the Iowa Court applied the "exclusion of every other hypothesis" rule in the *Reimer* case. Because the Iowa Court applied the more strict rule in that case, which is not the law of Iowa today, that case is not a valid or binding authority today. In other words, the decision of the case at bar is not controlled by the *Reimer* case, and it must be rejected as applying a standard contrary to the present Iowa law.

Respondent has already distinguished the case of *Reimer* v. *Musel* 217 Iowa 377, 251 N. W. 862 (1933) on the basis that it applied the "exclusion of every other reasonable hypothesis rule" instead of the "more reasonably probable rule" which is the law of Iowa today. It is also out of date *and contrary* to *Smith* v. *Darling & Co., supra,* and *Hackman* v. *Beckwith, supra.* The quotation in the Petitioner's brief from the *Reimer* case, *supra,* that where the cars came to rest proves nothing is directly contrary to more recent Iowa cases. Judge Graven, in his Memorandum (R. 81, 82) quoted from the case of *Slabaugh, et al.,* v. *Eldon Miller,* 244 Iowa 29 at 33, 55 N. W. 2d 528 (1952) as follows:

> "How motor vehicles will rebound after a collision is something no one can definitely say. A car, or truck, which is clearly upon the left-hand side may be driven back upon its own proper part of the highway by the force of the collision, and conversely the one which is struck while lawfully in its own lane may rebound across the pavement to the left side. Granted that there is room for argument that this is unlikely, and that some weight may be attached to the positions of the vehicles as they come to a stop after colliding, we think whatever that weight may be is ordinarily a question for the jury."

The *Hackman,* case, *supra,* states the same proposition as to deductions to be made from position of cars in circumstantial evidence cases on page 279 of 64 N. W. 2d:

> "In any event, the deductions to be made from the positions of the vehicles as they came to rest after an accident, the tracks found on the roadway, and the location of dirt and debris from collisions, are ordinarily for the jury."

Therefore, the *Reimer* case, *supra,* is *thoroughly discredited* and *is not a binding authority today* and *is directly contrary* to *Smith* v. *Darling & Co., supra,* and *Hackman* v. *Beckwith.* The Circuit Court of Appeals for the Eighth Circuit followed the latest Iowa cases in deciding this case below, and, therefore, the Petition for Writ of Certiorari should be denied.

II.

CIRCUIT COURT OF APPEALS DID NOT DENY PETITIONER'S RIGHT OF APPEAL BECAUSE IT AGREED WITH TRIAL COURT'S DETERMINATION OF A QUESTION OF IOWA LAW.

The Circuit Court of Appeals considered the opinions in the Iowa cases relied upon by the petitioner and rejected petitioner's contentions concerning them. Said Court expressly found that it was in agreement with the trial court that *Smith* v. *Darling & Co. supra* was controlling as against earlier cases relied upon by petitioner. It also found that *Hackman* v. *Beckwith, supra,* decided after the trial court's ruling in the case at bar, supported its conclusion that the trial court was correct. It expressly rejected petitioner's main contention that because of the absence of evidence of the marks the case at bar did not generate a jury issue. The Circuit Court also found that Judge Graven's ruling was not induced by a clear misconception or misapplication of local law. All of the foregoing was stated at the end of Circuit Court's opinion (216 Fed. 2d 537 at 541):

"We have read and considered the opinions in the Iowa cases relied upon by counsel for the parties.[1] We shall not attempt any analysis or reconciliation of them in this opinion. We think that the cases of *Smith* v. *Darling & Co.*, 244 Iowa 133, 56 N.W. 2d 47, and *Hackman* v. *Beckwith*, Iowa, 64 N.W. 2d 275, support the views expressed by Judge Graven. We note that in the *Hackman* case, the Supreme Court of Iowa said, at page 279 of 64 N.W. 2d:

> "• • • Practically all the debris came from appellants' truck, which some evidence shows carreened on down the road from the point of collision to its final resting place. In any event, the deductions to be made from the positions of the vehicles as they come to rest after an accident, the tracks found on the roadway, and the location of dirt and debris from collisions, are ordinarily for the jury. *Slabaugh* v. *Eldon Miller, Inc.* (244 Iowa 29), 55 N.W. 2d 528.

"The fact that in the instant case there was an absence of evidence of tire marks would not, in our opinion, make this rule inapplicable.

"Our conclusion is that Judge Graven reached a permissible conclusion, and probably the correct one, in determining that the issue of liabilitiy in this case was, under Iowa law, one of fact for the jury and not one of law for the court, and that his ruling in that regard was not induced by any misconception or misapplication of Iowa law.

"The judgment appealed from is affirmed."

In Division I of this resistance we have clearly shown by an analysis of the cases that the trial court and the Circuit Court were correct in rejecting petitioner's contentions. The ultimate issue tendered by the appeal was whether this

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1. *Reimer* v. *Musel*, 217 Iowa 377, 251 N.W. 863; *Vandell* v. *Roewe*, 232 Iowa 896, 6 N.W. 2d 295; *Potter* v. *Robinson*, 233 Iowa 479, 9 N.W. 2d 457; *Hayes* v. *Stunkard*, 233 Iowa 582, 10 N.W. 2d 19.

case was controlled or was not controlled by cases relied upon by petitioner. That issue was fully considered and determined against petitioner. The Circuit Court said Judge Graven acted in accord with the latest Iowa cases, namely, *Smith* v. *Darling & Co., supra,* and *Hackman* v. *Beckwith, supra,* and that *Reimer* v. *Musel, supra,* and other cases cited by petitioner were not controlling. Thus the ultimate issue as to local law was considered and determined.

The fact that the Circuit Court treated Judge Graven's ruling with respect did not deny petitioner any of her rights to an appeal. The action of the Circuit Court in giving weight to the trial court's determination of a question of local law finds approval in the opinions of the Supreme Court of the United States in dealing with such determinations by the Circuit Courts and District Courts. A good example of this is found in *Propper* v. *Clark,* 337 U.S. 472, at 486, which states:

> "Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by Federal Courts skilled in the law of particular states unless their conclusions are shown to be unreasonable. *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701-708, 69 S. Ct. 301, 303, 304; *Helvering* v. *Stuart,* 317 U.S. 154 63 S. Ct. 140, 87 F. Ed. 154; *MacGregor* v. *State Mutual Co.,* 315 U.S. 280, 62 S. Ct. 607, 86 F. Ed. 864."

The Supreme Court of the United States has never denied any litigant's right to an appeal because it showed respect to and deference for the lower courts determination of a question of local law and neither has the 8th Circuit in the case at bar. It is unthinkable that the Supreme Court of the

United States should intervene to exercise supervision over a Circuit Court for engaging in a practice, used and applied by itself.

Petitioner makes the mistake of claiming that its contentions were not considered because the Circuit Court of Appeals as a part of its consideration gives weight to the conclusions of a trial judge learned in the law of his State. Petitioner might have grounds to complain if the Circuit Court accepted the trial court's ruling and considered nothing else. Such was not the case here. The Circuit Court *examined* and *considered* and expressly rejected the cases relied upon by petitioner and concluded that the trial court was correct and that the trial court's ruling was not contrary to controlling Iowa law.

The Supreme Court of the United States should not grant certiorari in the case at bar because if granted it would not set aside the ruling of the lower federal court except on a plain showing of error. And *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 does not compel or require a different conclusion. In *Palmer* v. *Hoffman,* 318 U. S. 109, at 118; this principle was stated:

> "The propriety of applying the rule of the Fitzpatrick case to the causes of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co.* v. *Tompkins, supra,* which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

Petitioner has not and cannot make a plain showing of error in the case at bar. See Division I hereof which discusses the cases relied upon by petitioner and which show that the ruling below was correct and *not plainly erroneous.*

III.

THERE IS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The cases of *Mangol* v. *Metropolitan Life Ins. Co.* 7 Cir. 103 F. 2d 14; *Grand Trunk Western Co.* v. *H. W. Nelson,* 6 Cir. 118 Fed. 2d 252 and *Fakari* v. *Cadais,* 5 Cir., 149 Fed. 2d 321 are not in conflict with 8th Circuit's decision in the case at bar. The contention to the contrary, is bottomed on the unwarranted assumption that *Reimer* v. *Musel, supra* is a controlling Iowa case which the Court below refused to follow. In Division I hereof we distinguished the *Reimer* v. *Musel* case on two grounds: (1) It applied the "exclusion of every other hypothesis rule" rather than "the more reasonably probable rule" and under prevailing Iowa law the proper rule is "the more reasonably probable standard." *Smith* v. *Darling & Co., supra, Hackman* v. *Beckwith, supra.* (2) Its statement that location of cars after an accident have no probative value is directly contrary to statements in latter Iowa cases that location of cars after an accident do have probative value. *Hackman* v. *Beckwith, supra; Slabaugh* v. *Eldon Miller, Inc.* 244 Iowa 29, 55 N. W. 2d 528 (1952).

Reimer & Musel, *supra* has been repudiated as an authority in Iowa by directly contradictory and conflicting subsequent cases, *Smith* v. *Darling & Co., supra, Hackman* v. *Beckwith, supra.* It would have been plain error if the court had held it was controlled by *Reimer* v. *Musel, supra.*

In considering the question of proof required to make a jury issue on circumstantial evidence where two cars collide travelling in opposite directions, one can never find a "churn case," that is, a precedent case that has precisely the same facts. This is, no doubt, to what the Iowa Supreme Court referred when in *Smith* v. *Darling & Co.,* 244 Iowa 133, at 144, 56 N. W. 2d 47 (1952) it said:

"Precedents are usually of comparatively little value in determining whether a jury question is presented on the facts of a particular case of this kind."

However, the precedents are useful in establishing certain legal standards for submissibility. *Smith* v. *Darling & Co., supra* and *Hackman* v. *Beckwith, supra* establish the following standards which were found controlling by the Courts below:

(1) The evidence must be such as to make plaintiffs theory of causation reasonably probable, not merely possible, and more probable than any other hypothesis based on such evidence. The evidence need not be so clear as to exclude every other possible theory.

(2) Deductions to be made from the position of cars as they come to rest after an accident have probative value.

(3) It is not fatal to plaintiffs case that the exact position of the two vehicles or the exact manner in which they collided is not shown provided there is substantial evidence the collision occurred on plaintiff's decedent's side of the road.

Because no Iowa case can be found with precisely the same facts as are shown by the evidence in the case at bar, the courts below had to determine whether or not, under the above standards, the evidence was sufficient for the jury. Both the trial court and Circuit Court of Appeals determined that it was sufficient. Surely such a finding of local law is not plain error which would justify the issuance of a writ.

While the trial court said the trend of the Iowa cases was toward submissibility, he plainly said he was basing his decision on the present Iowa law as he found it. In denying petitioners Motion for directed verdict the trial court said:

"I am bound by *Smith* v. *Darling* and I will submit

the issue to the jury on the circumstantial evidence theory." (R. 57).

The trend he found in other types of circumstantial evidence cases corroborate his conclusion.

CONCLUSION

The trial court and the Circuit Court of Appeals both correctly determined in accord with controlling Iowa law that the circumstantial evidence in this automobile case was sufficient for submission to the jury. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opinion and Ruling of the Trial Court from the Case of *Smith* v. *Darling*, 244 Iowa 133, 56 N. W. 2d 47 (1952) Granting Defendant's Motion for Judgment Notwithstanding the Verdict. Iowa Supreme Court reversed.

(From THE RECORD of said case, page 79, line 3, to page 103, line 30, inclusive.)

Submission of this cause to a jury resulted in a verdict for the plaintiff. It is now before the Court on defendants' motion for judgment notwithstanding verdict, etc., filed December 20, 1951, which has been orally argued and submitted.

The action arises out of an accident between trucks driven by plaintiff's decedent and an approaching truck driven by defendant Sperfslage, the collision occuring near the east end of a bridge that the defendant truck had crossed traveling east and which the decedent was approaching traveling west. Each driver was alone, the only survivor being the defendant Sperfslage. There were no other eye-witnesses. The plaintiff's case is based entirely upon circumstantial evidence and reliance is placed upon physical facts, to-wit, damage to trucks, location of debris, the location of the trucks after the accident, and certain tire marks appearing on the north slab of the paving. Reference is made to oil spots but there is no such evidence in the record; there was testimony of gasoline odor but its location was not localized by any witness.

When defendants moved for a directed verdict, at the close of the plaintiff's evidence and at the close of all the evidence, ruling was made in an atmosphere of contention and without due time for deliberate analysis; in overruling said motions, the Court had in mind that the jury might resolve the question if it returned a verdict for the defendants. A verdict having been returned for the plaintiff, the Court is confronted with the identical questions on motion for judgment notwithstanding as upon motions to direct. The ruling now made is the result of

careful analysis of all the fact and circumstances, and considerable independent research.

At the outset certain fundamental rules involved may well be stated. It is recognized that, in passing upon the motion, the evidence must be viewed in the light most favorable to the plaintiff. The burden is upon and remains with the plaintiff to the end of the case to establish by proof, not only the fact of negligence as alleged, but also to show a direct connection between such negligence and the collision resulting in decedent's death, as well as decedent's freedom from contributory negligence. Where an ultimate fact is not susceptible of direct proof, its existence must directly follow as a reasonable conclusion from its basic facts and circumstances, and it may be stated as an axiomatic rule that whenever court or jury are left by the evidence in a situation where, in order to find the ultimate fact alleged, they must piece but the facts adduced with conjecture or supposition, the plaintiff must be held to have failed in his proof. The Iowa rule in negligence cases resting upon circumstantial evidence is that the physical facts and circumstances relied upon must be such that the essential ultimate facts are reasonably probable, not merely possible, and more probable than any other hypothesis based on the evidence presented. See SCHWARTZ vs. HELSELL, 50 NW (2d) 573; HAYES vs. STUNKARD, 233 Iowa 582, 10 NW (2d) 19; WELCH vs. GREENBERG, 235 Iowa 159, 14 NW (2d) 266; LATHAM vs. DES MOINES ELEC. L. CO., 229 Iowa 1199, 296 NW 372; WHETSTINE vs. MORAVAC, 228 Iowa 352, 291 NW 425.

Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist, but the process is fatally vicious if the circumstances from which it is sought to deduce the conclusion depends itself upon conjecture. PEOPLE vs. KENNEDY, 32 N.Y. 141. Thus, an inference may not be reasonably based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility.

Verdicts must not be based on guesses or conjectures. See IN RE HELD'S ESTATE, 231 Iowa 85, 300 NW 699;

REIMER vs. MUSEL, 217 Iowa 377, 251 NW 863; WESTENBURG vs. JOHNSON, 221 Iowa 134, 264 NW 18; CLARK vs. BOLTON, et al, 246 NW 236 (Wis.); EBERSOLE vs. BRISTLINE 82 A (2) 11 (Pa); STANALONIS vs. BRANCH MOTOR EXP. 57 A (2d) 866 (Pa.); LANOIX vs. HOME INDEMNITY CO., 13 SO. (2d) 501 (La.).

Another rule that must be borne in mind is: What constitutes a reasonable basis for a verdict on a motion for judgment notwithstanding verdict must be determined in the light of the evidence as a whole and not by isolating and considering only part or parts of the evidence favorable to the verdict; the evidence contrary to the verdict as rendered may not be properly ignored or discarded. See STATE vs. PASKEWITZ, 47 NW (2) 199 (Minn.) and Potter vs. ROBINSON, 233 Iowa 479, 9 NW (2) 457.

In passing upon the motion now presented the physical facts relied upon by the plaintiff must be examined in the light of the foregoing rules, and in addition to being considered as a whole, must so far as possible be related to the *very moment of the collision.* Only by so doing may fair and reasonable inferences be drawn as to the movements and locations of the trucks immediately prior to and at the moment of impact. This is pointed up by the language of the courts in many states. For Iowa cases, see REIMER vs. MUSEL, 217 Iowa 377, 251 NW 863; WESTERNBURG vs. JOHNSON, 221 Iowa 134, 264 NW 19.

In analyzing the physical facts relied upon by the plaintiff, it is also important to understand the plaintiff's theory upon which recovery is sought. In a written memorandum submitted by plaintiff's counsel immediately prior to trial, after describing the damage to each truck, theory of the manner in which the accident occurred is set forth, as follows:

> "It, therefore, is evidence that there was no sideswiping of the cars and no head-on collision with the decedent's truck. If such were the case there would be evidence marks on the left front fender, bumper,

radiator and grill of decedent's truck. It, therefore, is plaintiff's theory that decedent was proceeding on his own right-hand side of the highway and when he was approximately 50 feet away from the bridge it appeared that defendant's truck was proceeding across the black line or center of the highway and that it would be impossible for plaintiff's decedent to continue on his right side of the highway, that he attempted to turn sharply to the left to avoid a head-on collision and that the front of defendant's truck struck decedent's panel truck practically broadside on the north side of the highway (right side for the H & H truck) approximately 25 feet to the east of the bridge and this is supported by the location of the seat of the H & H truck and the siding or paneling, as is most of the debris." • • •

"The plaintiff's theory further is that the striking of plaintiff's decedent's car in the side caused it to spin and go out of control and this resulted in the rear end of it being thrown into the north side of the bridge and causing it to overturn."

To so theorize the plaintiff must ignore certain physical facts opposed thereto, the tire marks showing a turn at short angle by defendant truck—tracks extending from center line across north half of paving (described by witness Bunting), and must also ignore the focal point of damage to defendant truck and the 4 or 5 inch drop off at north edge of paving. What evidentiary basis is there for this suppositional situation that squares with the physical facts as a whole?

In a written memo after trial and before submission of motion for judgment notwithstanding verdict—repeated in oral argument of motion—plaintiff's counsel asserts that it was not necessary that plaintiff adopt a theory of the manner in which accident occurred and also states:

"The only theory we can see in the case so far as the plaintiff is concerned is the theory that from the physical facts and circumstantial evidence the collision occurred on the right side of the highway."

Such a theory could not be reasonably probable in the light of the principal physical facts shown.

In a written brief following submission of motion for judgment notwithstanding the plaintiff (after quoting from opinion in MELVILLE vs. STATE OF MARYLAND, 155 Fed. (2) 440) states:

> "We think it perfectly plausible that the defendants' truck went out of control in crossing the bridge and struck the bridge on the left side and thereafter was out of control and coming directly in the path and north portion of the highway towards the plaintiff's decedent's car; that some thirty feet from the bridge the plaintiff's decedent deviated and turned to his left in an attempt to avoid a head-on collision and that the defendant also deviated sharply to his left or to his wrong side and that the panel truck came into contact with the corner or frame of the truck, swinging it sharply about so as to cause the right side of the panel truck to come in contact with the steel frame of the box on the truck, tearing it away, and causing the panel truck to overturn on the bridge. This is perfectly plausible in view of the fact that the panel truck proceeded on past the point of the collision and came to rest in the center of the bridge on the paved portion of the highway."

Such a theory is not reasonably probable if viewed in the light of the physical facts established. It will be noted that there is no evidentiary basis for the theory that right side of panel truck came into contact with the *right* side of defendant truck.

The photographs in evidence and the testimony show that there was no damage to the front of the panel truck driven by the decedent other than that the right headlight had popped out; both running boards were intact, a part of the paneling on the right side of the truck was broken, torn or jolted off in some manner—it and a bucket seat were found at about the north edge of the paving (See Exhibit No. 16). Broken glass, broken or torn parts, papers

and small items of merchandise from the decedent's truck were scattered over a considerable portion of the road. At the time of taking the photographs, more was on the north half than on the south half of the road, but it was all over the road and some had been cleaned up before pictures were taken; it was not concentrated in any one spot or spots; a witness produced by the plaintiff testified that the left rear spring of panel truck was arched up, and said it must have been caused by an impact at or on the rear of the truck; the truck driven by the decedent traveled a considerable distance after the collision, and, as shown by the photographs, was virtually wedged in between the railings of the bridge, with all of the wheels in the air and with the rear of the truck butting up against the north railing of the bridge, practically adjacent to that part of the concrete railing which was knocked loose and fell into the river. Plaintiff's first theory above referred to was that after impact the panel truck was caused to spin, go out of control "and this resulted in the rear end of it being thrown into the north side of the bridge." Being thrown into the north railing of bridge could well account for the part broken out, for the holes and scuff marks on rear panel, and the damage to the left rear end caused by an impact at the rear, as testified to by witness Gass. (See Exhibit No. 13).

The defendant testified that he was at all times on his right-hand side, the south side of the paving, until after the moment of impact, that the approaching truck swerved across the center line and into the left front portion of his truck; that he closed his eyes to the flying glass and recalls nothing further until the truck came to a stop.

The only tire marks observed were by the witness Bunting, who described them as faint marks that, "kind of kept jumping". Mr. Bunting also testified that the left front wheel of the defendant truck was cramped real short after the accident and in that respect was different than the photograph, Exhibit No. 15, saying, "it looked like it maybe locked or he turned short." He described the tire marks as starting right at the center line and running in

a northeasterly direction across the north half of the paving and went right along with the marks in the dirt leading to the place where the truck came to rest. There is no showing as to which wheels made these marks and there is no interruption or break in the general direction in which they ran. The lack of any break or interruption in the direction of these marks reasonably indicates that the trucks did not collide on the north half of the pavement. If the truck driven by the decedent had been properly proceeding on its north half of the paving, it is inconceivable that it could have collided with the defendant truck on the north half of the pavement without suffering extensive damage to either its own front or left side. The witness Bunting testified that there was a groove or drop-off of 4 or 5 inches at the north edge of the pavement immediately east of the approach to the bridge, and that it was filled in the next morning. This fill is shown in the photograph, Exhibit No. 3. The defendant testified that the truck driven by the decedent swayed as it neared the bridge, its two right wheels went over the drop-off or groove and when it pulled back on the pavement, it swerved across the center line to the south side of the road and immediately into his path.

It has been noted that the plaintiff's theory of the accident is that the decedent was obliged to suddenly swerve to the left to avoid a head-on collision. What evidentiary basis is there for this assumption? Under the record isn't it more probable that the decedent's truck did swerve around in front of the defendant's truck after the right wheels were brought back onto the pavement? Isn't is more probable that the tire marks made by defendant truck across the north slab of the pavement were made *after* the collision than before, especially in view of the damages sustained by the respective trucks and the lack of a break in the direction of the marks across the north slab to the point where defendant truck came to a stop?

The precise movement of the trucks after impact and until they came to rest, and particularly that of the panel truck driven by the decedent, defies explanation. Counsel all admit this. The inability to know the twisting course

of the panel truck is due partially to the lack of circumstances showing its exact position with relation to the defendant truck at the time of collision. It is always difficult, if not impossible, to accurately determine the cause of an accident by starting with the position of the cars after the collision and working backward. The trucks here undoubtedly had been traveling at fairly good speed. There was a strong northwest wind—a head and cross wind to the decedent going west. The angle of the approach and contact is conjectural. The conscious or unconscious movements of the drivers of each of the trucks at and immediately before the collision is not fully known; there was but a brief interval permitted for such movement. The physical forces under conditions then existing and the direction and course of movement resulting from any assumed manner of impact is conjectural. All of said factors entered into the forces which determined the position of the trucks at the time they came to rest.

In the case of LANOIX vs. HOME INDEMNITY CO., 13 So. (2) 501, the Louisiana Court said:

> "Due to the antics motor vehicles will commit and do in accidents, it is impossible for us to come to any definite conclusion as to how this unfortunate accident * * * happened."

In the Michigan case of LOUCKS vs. FOX, 246 NW 141, a death action, the Court said:

> "The testimony is meager as to how the accident occurred. The decedent died almost immediately after the accident * * * The physical condition of the cars and the tracks which remained unobliterated on the road only add to the uncertainty."

In SHAFER vs. STATE, 189 A. 273 (Md.) the plaintiff's decedent was killed and it was sought to establish negligence of the defendant by testimony consisting of marks on the road seen by witnesses arriving at various times after the accident. The court said:

> "Reliance on such evidence alone for judicial de-

termination of movements leading to a collision * * * is beset with dangers, but there would seem to be no room for doubt that in many cases it might amount to proof of negligence. It would be legally sufficient or insufficient in a particular instance according to how it might or might not rise above speculation and conjecture on what had taken place, and so afford the rational basis needed for an adjudication that the defendant's agent was guilty of negligence which produced the accident."

The physical facts relief upon as circumstantial evidence must therefore be such as point out the movement and position of each truck *at the time of the collision or impact* in order to have probative force. For instance, the position of the colliding cars at the time of the collision was considered as the crux of the controversy in the case of POTTER vs. ROBINSON, 233 Iowa 479, 9 NW (2) 457, where it was said, "Which vehicle was on the wrong side of the road *at the time of the impact?* * * * The evidence on this issue determines whether or not a jury question was presented." In determining the propriety of directing a verdict in that case the court stressed the necessity of considering *all* the evidence. The physical facts throwing light upon the respective positions of the cars at the time of collision was given great emphasis in the cases of REIMER vs. MUSEL, supra, and WESTERNBERG vs. JOHNSON, supra. A physical fact that is always revealing is the location of the damage to each of the colliding cars. In the case of HAYES vs. STUNKARD, supra, a pedestrian case, particular emphasis was given to the fact that the principal injury to the decedent's body was on her right side as that indicated the direction in which she must have been traveling at the time she was struck. This fact tied in as a necessary link in a chain of circumstances which made the plaintiff's theory of the accident more probable than any other theory, as distinguished from a mere possibility.

A theory of causation, contained in plaintiff's last brief, as heretofore noted, suggests the possibility of the defendant truck striking the left or north concrete railing

of the bridge, then proceeding across the bridge with truck partially out of control on the wrong side of highway, the decedent then turning to the left to avoid a head-on collision, and defendant also deviating sharply to the left, thereby bringing right side of panel truck in contact with steel frame of box, etc. The plaintiff refers to the testimony of the witness Latchaw, who states that he observed some dead white powder in the fold on the left fender and in the front bumper where broken (there is no reference to amount of powder or dust found by the witness); he further says that the bridge railing was white. There is no other evidence which in any wise tends to lend support to an inference that defendant struck the railing. Does plaintiff seriously contend that from this fragmentary evidence it may be reasonably and logically inferred that the defendant truck broke the railing while crossing the bridge? This is highly conjectural—it is a mere possibility: It is shown that the defendant had been traveling on a graveled road. He came onto the pavement just two miles from the point of the accident. There is no evidence of white dust near the point where the railing was broken out or elsewhere near scene of the accident; there is no evidence of any concrete or broken particles along the bridge. There is no evidence of any concrete scratches or scars on the bumper or the left side of the defendant truck. The routes of both trucks covered unpaved roads. It was dry and windy, and, no doubt, dusty. That would be common knowledge. The language of the court in MADDEN vs. GREAT ATL. & PAC. TEA CO., 162 A. 687 (Pa.) is pertinent at this point.

> "When, in the proof of a particular fact, dependence is rested upon a succession of inferences or a chain of indefinite links, the probability of a certain result following becomes so tenuous that it cannot be accepted."

There is an entire absence of evidence as to tire marks which would in all probability have been present if the possibility suggested by the plaintiff's counsel had in fact occurred. It is more probable that the force with which

the rear end of the panel truck struck the north bridge railing when it came to rest loosened and broke the railing. This would be consistent with the testimony of the witness Gass, produced by plaintiff, that the left rear spring and frame were arched up and driven ahead toward the front; on cross examination he testified that an impact from the rear toward the front might cause such damage.

It has been heretofore pointed out that the evidence must be considered as a whole and that the plaintiff may not rely upon a part of the physical facts to sustain a theory and ignore other equally important physical facts inconsistent with such theory. Care must be exercised to distinguish adjudicated cases where the plaintiff has relied *wholly* on circumstantial evidence from those in which theory of causation is aided by direct evidence indicating the location or position on the road of the cars just before the accident, such as in HAWKINS vs. BURTON, 225 Iowa 707, 281 NW 342, and HAYES vs. STUNKARD, supra, cases in which the point of impact and the movement or direction of the cars prior thereto is quite positively indicated or located by tire marks of both cars, or where there is little or no movement of the cars after impact, sometimes being locked together, such as ESTATE OF GORETSKA, 234 Iowa 1081; MELVILLE vs. STATE OF MARYLAND, 155 Fed. (2) 440; another type of case that is distinguishable is where there is a concentration of glass, dirt or debris falling from the cars, or perhaps gouges, scratches or oil spots in the roadway which have considerable probative force in fixing the point of impact.

In this case there is the plaintiff's claim that decedent turned abruptly to the left. The right side of the panel truck was knocked off in some manner. Naturally, with the right side of the truck completely open the contents, such as candy bars, cigarettes, etc., as well as the seat, would have fallen out through the open side. Exhibit No. 2 even shows candy bars and other items obviously thrown out of open left door window onto south half of paving after panel truck came to rest. Under any theory it must be

the truck became free and went on twenty-five or forty feet farther before it, too, stuck in the bank. That any of that movement after leaving the center of the road may have been due to steering or other action by the driver of the truck it would be impossible to judge from the marks described, for the breaking in of the left front by the collision might, and almost certainly would, have an effect on the direction in which the momentum of the vehicle would take it in the fraction of a second before it came to rest. The bending in of the left front wheel and other injuries on that side would naturally tend to turn the truck to the left. The exact place on the road where the two vehicles came together seems to be left in uncertainty, except that Captain Peters, from his brief examination, and other witnesses, were of the impression that the collision occurred somewhere in the middle of the road. The pool of blood accumulated near the side of the road, by the decedent's head, and the broken glass there and to the rear, would not indicate the spot of the collision, for the movement from any point of impact to the road-bank must necessarily have been very quick, almost instantaneous, and the wound might have been received, and the breaking of glass occurred, in any part of the movement while the two vehicles were together, before the truck was clear of the car and went beyond it. In the marks on the side of the road, therefore, the court finds no evidence legally sufficient to indicate the cause of the collision. They do not carry the view back of the fact of a collision throwing the vehicles to the one side. There may be room for conjecturing the cause, but nothing more, and 'in matters of proof we are not justified in inferring from mere possibilities the existence of facts.'

"• • • there is no testimony of any indication that the truck which made the marks astride the center to the west swerved in its course before reaching the point of the collision, and this raises a question of causal connection between the collision and a violation of the rule requiring passing vehicles to keep to the

right of the center. This vehicle left from nine to eleven feet of roadway open to its left, and it could not be assumed that two vehicles of the size of these, approaching each other in the situation described, on a straight roadway, would fail to pass, unless one or the other swerved. And if this was the case, here, and one swerved, it could not be said from any evidence that it was the truck that did so.

"Negligence in violating the rule by extending over the center would not give a cause of action unless it did in fact cause the accident and injuries complained of (cases cited). And the evidence produced in this case—all the evidence produced, perhaps,—to prove causal negligence in the driving of this truck when approaching and reaching the point of collision does not, we think, rise above speculation and conjecture. 'There must be proof of the essential facts to fix liability upon a party charged with the commission of a wrongful act; and even a scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendant will not justify the court in submitting the case to the jury. There must be, in a case like the present, some reasonable evidence of well-defined acts of negligence, as the cause of the injury complained of'."

It is not enough that the evidence merely shows a possibility that the defendant was on the wrong side of the road when the collision occurred. See UNION UNDERWEAR vs. BARNETT, 148 (SW) (2) 339, (Ky.). Therefore, unless it is a fair, reasonable and legitimate inference from the facts and circumstances disclosed by the evidence in this case that the trucks collided on the north half of the paving, that is, that some part of the defendant truck was north of the center line of the paving *at the time the collision occurred,* then any theory of the plaintiff as to negligence on the part of the defendant driver and any claim that the alleged negligence had any proximate causal connection with the death of the decedent, is conjectural.

Having considered somewhat in detail the various physical facts and the circumstances relied upon by the plaintiff, the following questions may be asked: How may the physical damage to the trucks involved herein be reconciled with any theory that the impact occurred on the north half of the paving? How could the trucks have collided on the north half of the paving without some damage resulting to the front end or to the left side of the panel truck? Assuming there may be some evidentiary support for the claim that the decedent turned left to avert a head-on collision, how can such theory be reconciled with damages only to the left front and front of defendant truck—there being no damage shown to the right front, right side or to the box or body of defendant truck?

The damaged and undamaged portions of the two trucks are the most significant physical facts as to their respective positions on the highway at the time of impact. The lack of damage to the front or left side of the decedent's truck, as well as the lack of damage to the right side of defendant truck, points to the nonprobability of impact on the north side of the paving (the proper side for the decedent). The suggested possibility that the defendant may have hit the cement railing is mere speculation and presents no more than a scintilla of evidence which, under the holdings in this state, is not sufficient to make a jury question. POTTER vs. ROBINSON, supra.

It was incumbent upon the plaintiff, in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury which caused the death of plaintiff's decedent, was due to the wrongful act of the defendant driver, and not leave the question to mere speculation or conjecture. The facts and circumstances shown must be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates. As heretofore stated, the plaintiff's evidence, when considered as a whole, must be such as to make the theory of causation reasonably probable, not merely possible, and more probable than any other hypothesis based on the evidence.

It is the conclusion of the Court, after a careful consideration of all the evidence, that the submission of the case to the jury was not warranted.

Accordingly, it is ordered that paragraph 1 of Division I, Motion for Judgment Notwithstanding Verdict, filed December 20, 1951, be sustained as to each paragraph thereof, except subparagraphs (4) and (8) thereof. It is therefore ordered that the verdict and the judgment entered thereon on the 13th day of December, 1951, be and the same is hereby set aside, and judgment is now entered in favor of the defendants, notwithstanding the verdict, and the costs taxed to the plaintiff.

Dated this 7th day of April, 1953.

BY THE COURT

G. B. RICHTER
Judge, 13th Judicial District of Iowa